

University of Dayton eCommons

School of Law Faculty Publications

School of Law

2012

Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age

Thaddeus A. Hoffmeister

University of Dayton, thoffmeister1@udayton.edu

Follow this and additional works at: https://ecommons.udayton.edu/law_fac_pub



Part of the [Courts Commons](#)

eCommons Citation

Hoffmeister, Thaddeus A., "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age" (2012). *School of Law Faculty Publications*. 25.

https://ecommons.udayton.edu/law_fac_pub/25

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlangen1@udayton.edu.

GOOGLE, GADGETS, AND GUILT: JUROR MISCONDUCT IN THE DIGITAL AGE

THADDEUS HOFFMEISTER*

This Article begins by examining the traditional reasons for juror research. The Article then discusses how the Digital Age has created new rationales for juror research while simultaneously affording jurors greater opportunities to conduct such research. Next, the Article examines how technology has also altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing the reasons jurors violate court rules about discussing the case.

In Part II, the Article explores possible steps to limit the negative impact of the Digital Age on juror research and communications. While no single solution or panacea exists for these problems, this Article focuses on several reform measures that could address and possibly reduce the detrimental effects of the Digital Age on jurors. The four remedies discussed in this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Article analyzes two sets of jury instructions to see how well they adhere to the suggested changes proposed by this Article. This is followed by a draft model jury instruction.

* Associate Professor of Law, University of Dayton School of Law. In addition to researching and writing on issues impacting jurors, the author edits a blog titled *Juries*. Prior to teaching, he served in the military, clerked for a federal judge, and worked on Capitol Hill. He earned his BA (French) from Morgan State University, JD from Northeastern University School of Law, and LLM from Georgetown University Law Center. His next article, *Investigating Jurors in the Digital Age: One Click at a Time*, will appear in the *University of Kansas Law Review*. The author would like to acknowledge Professor Nancy Marder and Dean Margaret Raymond for their useful and helpful suggestions. In addition, research assistants David Marviglia, Mike Porter, and Christine Seppeler were invaluable. This Article also benefitted from thorough editing by the staff of the *University of Colorado Law Review*. Of course, any errors or mistakes in this Article are solely the responsibility of this author.

As part of the research for this Article, this author conducted one of the first surveys on juror conduct in the Digital Age. The survey was completed by federal judges, prosecutors, and public defenders throughout the country. The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age's impact on juror communications and research. Second, it operated as a barometer for the reform proposals suggested by this Article.

INTRODUCTION	411
I. PROBLEM AREAS	417
A. <i>Research</i>	417
1. Traditional Reasons for Juror Research	419
2. Modern-Day Reasons for Juror Research	422
B. <i>Communications</i>	425
1. Juror-to-Juror Communications	425
2. Juror-to-Non-juror Communications	428
3. Reasons for Improper Juror Communications	433
II. POSSIBLE SOLUTIONS	436
A. <i>Imposing Penalties</i>	436
1. Contempt	437
2. The "Luddite Solution"	439
3. Sequestration	441
B. <i>Investigating Jurors</i>	442
C. <i>Allowing Questions</i>	446
D. <i>Improving Instructions</i>	451
1. Component Parts	452
2. Sample Instructions	458
a. <i>Multnomah County, Oregon</i>	458
b. <i>Judicial Conference Committee</i>	460
c. <i>Analysis</i>	461
3. Model Instructions	465
a. <i>Introduction to Model Instructions</i>	465
b. <i>Text of Model Instructions</i>	465
CONCLUSION	468
APPENDIX (JURY SURVEY QUESTIONS)	469

INTRODUCTION

*The theory of our [legal] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.*¹

*In the face of ignorance—or curiosity—we “Google.”*²

Like most members of society, jurors have been influenced by the Information or Digital Age.³ In some respects, this impact has been positive. Today’s jurors, unlike their predecessors, spend far less idle time at the courthouse. This time is reduced because mundane tasks such as watching orientation videos and filling out juror questionnaires can now be completed online.⁴ Furthermore, by using email, the court can send out the jury summons⁵ and complete certain aspects of jury selection electronically.⁶ Another benefit of the Digital Age includes the creation of court websites that provide jurors with useful information about jury service.⁷

However, the ease with which information is disseminated to and accessed by jurors has drawbacks. Just as jurors use the Internet to learn directions to the courthouse, they also learn definitions of important legal terms,⁸ examine court case files,⁹

1. *Patterson v. Colorado ex rel. Attorney Gen. of Colo.*, 205 U.S. 454, 462 (1907).

2. Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 288 (2008).

3. *Id.* (“[The Internet] has permeated every aspect of our society, including the American courtroom.”).

4. Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1271 (2001); MaryAnn Spoto, *Online Juror Surveys Makes Process Easier for Courts, Citizens*, STAR-LEDGER, Feb. 8, 2011, at 16.

5. Marder, *supra* note 4, at 1272.

6. See *State v. Irby*, 246 P.3d 796, 800–01 (Wash. 2011) (disallowing jury selection by email because not all parties were involved).

7. For example, the website for the Court of Common Pleas in Franklin County, Ohio, allows potential jurors to learn about juror eligibility, dress code, courthouse security, requests for excuse and postponement, terms of service, and compensation. *Jury*, FRANKLIN COUNTY CT. COMMON PLEAS, <http://www.fccourts.org/gen/WebFront.nsf/wp/658B17FFA9A383B0852574FB006DB07A?opendocument> (last visited July 7, 2011).

8. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>. In one Florida case, a criminal conviction was

view photographs of crime scenes,¹⁰ and even download medical descriptions of powerful drugs.¹¹ During one trial, nine of the twelve sitting jurors conducted some form of independent research on the Internet.¹² In another trial, a juror enlisted a family member in his quest to unearth online information.¹³

Advancements in technology also provide jurors new methods by which to communicate with others.¹⁴ In some instances, jurors have communicated with other jurors,¹⁵ witnesses,¹⁶ attorneys,¹⁷ and defendants¹⁸ through social media websites and email. While sitting in the jury box, jurors have disseminated their thoughts about the trial and received the views of others.¹⁹ On certain occasions, this information has

overturned because the foreman of the jury looked up the definition of “prudence.” *Tapanes v. State*, 43 So. 3d 159, 160 (Fla. Dist. Ct. App. 2010).

9. See Bill Braun, *Judge Closes Trial’s Internet Window*, TULSA WORLD, May 3, 2010, at A1, available at http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100503_14_A1_Inasig174831.

10. Robert Verkaik, *Collapse of Two Trials Blamed on Jurors’ Own Online Research*, INDEPENDENT (Aug. 20, 2008), <http://www.independent.co.uk/news/uk/home-news/collapse-of-two-trials-blamed-on-jurorsrsquo-own-online-research-902892.html> (“A judge at Newcastle Crown Court was forced to discharge a jury in a manslaughter trial yesterday when one of the jurors sent him a Google Earth map of the alleged crime scene and a detailed list of 37 questions about the case.”).

11. *People v. Wadle*, 77 P.3d 764, 770–71 (Colo. App. 2003), *aff’d*, 97 P.3d 932 (Colo. 2004).

12. John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 17, 2009, at A1, available at <http://www.nytimes.com/2009/03/18/us/18juries.html>.

13. *Commonwealth v. Szakal*, LEGAL INTELLIGENCER (Nov. 16, 2009), <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202435434751> (paid subscription).

14. See *United States v. Fumo*, 655 F.3d 288, 298 (3d Cir. 2011).

15. *United States v. Siegelman*, 640 F.3d 1159, 1181–85 (11th Cir. 2011).

16. See, e.g., Kathleen Kerr, *Attorneys: Juror Tried to ‘Friend’ Witness on Facebook*, NEWSDAY (Apr. 7, 2009), <http://www.newsday.com/long-island/crime/attorneys-juror-tried-to-friend-witness-on-facebook-1.1217767>; see *People v. Rios*, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Sup. Ct. Feb. 23, 2010) (noting that a juror used Facebook to contact a witness).

17. See, e.g., Thomas Zambito, *Judge Declares Mistrial in Rape After Juror’s Email Ridicules ‘Doubting Thomases’ on the Jury*, N.Y. DAILY NEWS (June 9, 2011), http://articles.nydailynews.com/2011-06-09/news/29654981_1_reasonable-doubt-queens-prosecutors-mistrial.

18. *State v. Dellinger*, 696 S.E.2d 38, 40–42 (W. Va. 2010) (discussing a juror who failed to tell the court that she was MySpace friends with the defendant).

19. Christopher Danzig, *Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel*, INSIDECOUNSEL (June 2009), <http://www.insidecounsel.com/2009/06/01/mobile-misdeeds> (“You’ve got jurors who could literally be sitting in the box running an Internet search while testimony is going on.”) (quoting an attorney).

been made available online for the general public to see and comment.²⁰

Although this Article focuses on the American judicial system, it should be briefly noted that other countries have experienced similar problems from the widespread use of technology by jurors.²¹ In England, a juror conducted an online poll to determine the guilt or innocence of a defendant.²² In New Zealand, a judge was so troubled by the possibility of jurors going online to conduct research that he initially prevented the media from printing images or names of two defendants on trial.²³ Australia recently amended its Juries Act to raise the amount of potential fines assessed to jurors who improperly access the Internet during trial.²⁴

These new methods of juror research and improper communications, which have led commentators to coin phrases such as the “Twitter Effect,”²⁵ “Google Mistrials,”²⁶ and “Internet-Tainted Jurors,”²⁷ are problematic. Such activities lead to mistrials, which prove quite costly both financially²⁸ and emotionally for those involved in the trial.²⁹ In addition,

20. Deborah G. Spanic, *To Tweet or Not to Tweet: Social Media in Wisconsin's Courts*, ST. B. WIS. (Mar. 5, 2010), <http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=90872> (stating that in one trial, a juror tweeted, “I just gave away TWELVE MILLION DOLLARS of somebody else’s money!”).

21. See Afua Hirsch, *Is the Internet Destroying Juries?*, GUARDIAN (Jan. 26, 2010), <http://www.guardian.co.uk/uk/2010/jan/26/juries-internet-justice>.

22. Urmee Khan, *Juror Dismissed from a Trial After Using Facebook to Help Make a Decision*, TELEGRAPH (Nov. 24, 2008, 10:01 AM), <http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html>.

23. See Edward Gay, *Judge Restricts Online Reporting of Case*, N.Z. HERALD (Aug. 25, 2008, 5:06 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10528866.

24. See Ellen Whinnett, *DIY Jury Probe*, HERALD SUN (May 9, 2010, 12:00 AM), <http://www.heraldsun.com.au/news/diy-jury-probe/story-e6frf7jo-1225864033798>.

25. Ira Winkler, *An Appeal to a Jury of Your Twittering Peers*, INTERNET EVOLUTION (Mar. 24, 2009), http://www.internetevolution.com/author.asp?section_id=515&doc_id=173990.

26. Schwartz, *supra* note 12.

27. Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J. (Sept. 8, 2009), <http://www.stroock.com/SiteFiles/Pub828.pdf>.

28. See Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 302 (2009–10).

29. See Annmarie Timmins, *Juror Becomes a Defendant*, CONCORD MONITOR (Mar. 26, 2009), <http://www.concordmonitor.com/article/juror-becomes-defendant?SESSf8ff6c533a0d9d4898d6084f82d9a035=ysearch>.

improper juror research and communications call into question whether today's jurors can still function in their traditional role as neutral and impartial fact-finders.

In light of the media attention given to this topic, one might quickly conclude that improper juror research and communications are pervasive and growing problems.³⁰ However, beyond anecdotal discussions, there is little academic research or studies to prove this conclusion.³¹ The dearth of legal scholarship may be due in large part to the fact that (1) the Digital Age is a recent and still evolving era and (2) juror misconduct is historically an under-examined area of the law.³² The academic articles that address this subject primarily focus on the benefits of technology and how to harness it to aid in juror comprehension of the evidence submitted at trial.³³ Thus, there is a possibility that despite the high visibility of a few cases, no systemic problem exists.

In an attempt to resolve this question, the author conducted one of the first surveys on jury service in the Digital

30. Brickman et al., *supra* note 2, at 292 ("Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggest that it is not uncommon."); Grow, *supra* note 8. Grow notes:

The data show that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years.

Judges granted new trials or overturned verdicts in 28 criminal and civil cases—21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.

Id.

31. In the future, this author expects this area of law to receive increased scholarly attention. See generally Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935 (2010); McGee, *supra* note 28.

32. See Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 323 (2005) ("Although a considerable body of scholarship on the jury system, jury selection techniques, and jury decision-making exists, the issue of juror misconduct has not been as closely or systematically studied.") (footnotes omitted); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2673 (1996) ("This article examines two aspects of the jury system that have attracted far less attention from scholars than from the popular press: avoidance of jury duty by some citizens, and misconduct while serving by others.").

33. See Marder, *supra* note 4, at 1269–74; Gregory J. Morse, *Techno-Jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y.L. SCH. L. REV. 241, 247 (2009–10); Paul Zwier & Thomas C. Galligan, *Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century?*, 67 TENN. L. REV. 523, 529 (2000).

Age.³⁴ This “Jury Survey” was sent to federal judges, prosecutors,³⁵ and public defenders to learn how they viewed the impact of the Digital Age on jurors. The questions in the Jury Survey focused primarily on juror research but briefly touched upon juror communications.³⁶ Although conducted anonymously, the Jury Surveys were written to distinguish responses from judges and practitioners. Of the responses received, approximately half were from federal judges, and the other half were from either federal public defenders or prosecutors.

The Jury Survey served two purposes. First, it was used to determine the extent of the Digital Age’s negative impact on jury service. According to the Jury Survey results, this effect is statistically significant. Approximately ten percent of the respondents reported personal knowledge of a juror conducting Internet research.³⁷ In light of the difficulty of detecting this type of juror misconduct, this percentage probably underrepresents the actual number of jurors who use the Internet to research cases.³⁸ The second purpose of the Jury Survey was to receive feedback from those who regularly interact with jurors in criminal trials. For the most part, the Jury Survey respondents agreed with the proposed reforms discussed in this Article. The one noticeable exception was the topic of allowing jurors to ask questions of witnesses, which was met with disapproval by most Jury Survey respondents.

Obviously, a survey of this scope has some limitations. First, it only examined federal courts, not state courts. Second, all of the Jury Survey respondents were in some way affiliated with the federal government, as no actual jurors or private criminal defense attorneys were surveyed. Third, although

34. For another example of a survey covering similar issues as the Jury Survey, see NEW MEDIA COMM., CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE, available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

35. A few prosecutors refused to complete the Jury Survey because it was not approved by the Department of Justice.

36. See Jury Survey of anonymous respondents [hereinafter Jury Survey]. The Jury Survey is reprinted *infra* Appendix.

37. Jury Survey, *supra* note 36.

38. See Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLA. B.J., Jan. 2010, at 9–10 (“These examples represent recent transgressions that were *discovered*, and probably represent just the tip of the iceberg of juror behavior.”).

every federal district was surveyed, the overall number of responses received was small.³⁹ However, even with these drawbacks, the Jury Survey provides a good snapshot of current trends in the American legal system. In addition, it offers the views of those who are directly confronted with the problems of improper juror communications and research. Many of the responses provided by the Jury Survey respondents are highlighted throughout the Article.

Part I of the Article begins with a discussion of the Digital Age's influence on juror research and communications.⁴⁰ Here, the Article examines the traditional rationales for juror research.⁴¹ The Article then discusses how the Digital Age has created new reasons for juror research while simultaneously affording jurors greater opportunities to conduct such research. This Section also examines how new technology has altered juror-to-juror communications and juror-to-non-juror communications. Part I concludes by analyzing why jurors violate court rules about discussing the case before deliberations or outside of the deliberation room.

Part II analyzes possible steps to limit the negative impact of new technology on juror research and communications. While no single solution exists for these problems,⁴² this Part focuses on several reform measures that could address, and possibly reduce, the detrimental effects of the Digital Age on the legal process. The four remedies proposed by this Article are (1) penalizing jurors, (2) investigating jurors, (3) allowing jurors to ask questions, and (4) improving juror instructions. During the discussion on jury instructions, this Part analyzes two sets of jury instructions to see how well they adhere to the

39. Forty-one individuals responded to the Jury Survey.

40. The Digital Age has also impacted attorneys who investigate jurors online. For information on that topic, see *infra* Part II.B; see also Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. 28 (2011), available at <http://www.uclalawreview.org/wordpress/?p=2735>.

41. For the purposes of this Article, "jury research" refers to any effort by a juror to discover information about the case beyond that which was presented at trial.

42. Question 7 of the Jury Survey provided a list of potential solutions and asked respondents to select the most effective. One respondent answered, "[t]here is no one best method . . . [a] combination is most effective," while another indicated that a combination of three distinct solutions was required. Jury Survey, *supra* note 36.

suggested changes proposed by this Article. This is followed by a draft model jury instruction.

I. PROBLEM AREAS

A. Research

Although improper juror communications have raised numerous concerns in the Digital Age,⁴³ the issue presently generating the greatest anxiety is juror research.⁴⁴ While the underlying concept is not new, the methods by which jurors conduct research are.⁴⁵ Since the late 1990s, jurors, rather than relying solely on the evidence presented at trial, have increasingly turned to the Internet to obtain information about the case on which they sit.⁴⁶

Research by jurors is problematic because their verdict must be based on only the evidence offered in court.⁴⁷ Allowing jurors to decide a case based on outside information “violates a defendant’s Sixth Amendment rights to an impartial jury, to confront witnesses against him, and to be present at all critical stages of his trial.”⁴⁸ Unlike evidence presented in court, attorneys cannot cross-examine, question, or object to information discovered by jurors online. As the Third Circuit noted in *United States v. Resko*, “extra-record influences pose a substantial threat to the fairness of the criminal proceeding

43. See discussion *infra* Part I.B.

44. See Schwartz, *supra* note 12 (citing a trial consultant who suggests that “juror research is a more troublesome issue than sending Twitter messages or blogging”).

45. One of the first reported cases of juror research is *Medler v. State ex rel. Dunn*, 26 Ind. 171, 172 (1866); see also Caleb Stevens, *Lure of the Internet Has Courts Worried About Its Influence on Jurors*, MINNEAPOLIS/ST. PAUL BUS. J. (May 10, 2009, 11:00 PM), <http://www.bizjournals.com/twincities/stories/2009/05/11/focus3.html> (“Since the inception of a trial by jury, jurors have had the temptation of researching cases outside the courtroom against judges’ orders.”). As a Jury Survey respondent indicated in answering a question regarding Internet research by jurors, “This is just another aspect of an old problem.” Jury Survey, *supra* note 36.

46. See Grow, *supra* note 8.

47. See *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (“[E]vidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”).

48. *United States v. Dyal*, No. 3:09-1169-CMC, 2010 WL 2854292, at *12 (D.S.C. July 19, 2010).

because the extraneous information completely evades the safeguards of the judicial process.”⁴⁹

This is not to say that jurors must refrain from relying on life experiences to interpret the evidence presented by the parties.⁵⁰ Rather, jurors are not to make a decision based on outside or extrinsic evidence⁵¹ that lacks proper authentication.⁵² For example, a juror in a recent murder trial in Rhode Island went online to look up the definitions of “manslaughter,” “murder,” and “self-defense.”⁵³ The definitions discovered by the juror, however, were derived from California statutes and case law.⁵⁴ This juror’s actions ultimately led the trial judge to declare a mistrial.⁵⁵

The Digital Age, with its advancements in technology, has exacerbated the problem because, unlike traditional research, online research occurs before voir dire,⁵⁶ during trial,⁵⁷ and in the midst of deliberations.⁵⁸ Furthermore, online research, which generally does not attract the attention of others, can be accomplished almost anywhere. Jurors only need Internet access.⁵⁹ Some might think that online research is easier to detect than traditional research because the court can search a juror’s computer or handheld device. But this presupposes that

49. *United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993). Research also suggests that extrinsic information can greatly influence the decision-making of jurors. Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 LAW & HUM. BEHAV. 73, 86 (2002).

50. *See Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (“[A juror’s] observation concerning the life of this community is part of the fund of ordinary experience that jurors may bring to the jury room and may rely upon.”).

51. *See Brickman et al.*, *supra* note 2, at 289–90 (“Research has demonstrated that jurors’ exposure to media coverage and other extrinsic information about a case can be highly influential to their decision-making.”).

52. *See Dyal*, 2010 WL 2854292, at *12; Ken Strutin, *Electronic Communications During Jury Deliberations*, N.Y. L.J., May 19, 2009, at 5 (“The potential prejudice to the integrity of the process implicates basic fairness embodied in due process, right to a jury trial, confrontation and cross-examination.”).

53. Talia Buford, *New Juror Policy Accounts for New Technology*, PROVIDENCE J. (May 17, 2009), http://www.projo.com/news/content/TWITTER_AND_THE_JURY_05-17-09_C7EA4AE_v24.3549604.html.

54. *Id.*

55. *Id.*

56. *See Russo v. Takata Corp.*, 774 N.W.2d 441, 444–45 (S.D. 2009).

57. *See People v. Carmichael*, 891 N.Y.S.2d 574, 574 (App. Div. 2009).

58. *See State v. Aguillar*, 230 P.3d 358, 359 (Ariz. Ct. App. 2010).

59. *See Commonwealth v. McCaster*, 710 N.E.2d 605, 606–07 (Mass. App. Ct. 1999).

(1) the court knows to check those items,⁶⁰ (2) jurors would be amenable to such a practice, and (3) jurors did not access the Internet through public or non-personal means. To better understand and address the modern-day problem of online research by jurors, it is first necessary to take a step back and examine why jurors feel the need to conduct any research at all.

1. Traditional Reasons for Juror Research

Due to the nature of the adversarial system, limitations are placed on the information received by jurors. First, judges act as gatekeepers, controlling the flow of information to the jurors by limiting what evidence they may hear.⁶¹ Second, prospective jurors with pre-existing knowledge of the facts in dispute, the parties, or witnesses are generally challenged and dismissed by the attorneys or the judge.⁶² In choosing today's juries, "ignorance is a virtue and knowledge a vice."⁶³ This lack of information has led to increased juror curiosity and confusion. In addition, it has left some jurors feeling ill-equipped to determine a defendant's guilt or innocence.⁶⁴

According to one legal commentator, "There are people who feel they can't serve justice if they don't find answers to certain questions."⁶⁵ These so-called "conscientious jurors" take their role as fact-finders very seriously and aspire to do a good job.⁶⁶

60. Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, CT. MANAGER, Summer 2009, at 42, 44 ("It is very difficult to frame intelligible questions for jurors if the questioner does not fully understand what he or she is asking about or, for that matter, the responses of individual jurors to those questions.").

61. See *United States v. McKinney*, 429 F.2d 1019, 1022–23 (5th Cir. 1970) ("To the greatest extent possible, all factual [material] must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime."); Brickman et al., *supra* note 2, at 288 ("In a sense, though, the very existence of the Internet is antithetical to the idea of a controlled flow of information.").

62. Gershman, *supra* note 32, at 349.

63. *Id.* Historically, however, this was not the case. For a discussion of how the Digital Age may resurrect the original notion of a jury in which impartiality only referred to the absence of conflict, not a complete lack of information about the parties, witnesses, or facts in dispute, see generally Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579 (2011).

64. See *infra* text accompanying note 74.

65. Schwartz, *supra* note 12.

66. See Bridget DiCosmo, *Judge Re-enforces Electronic Gadget Ban*, HERALD MAIL, Jan. 22, 2010, at A1 ("Often, the jurors who end up causing problems by

But they feel unprepared to render a verdict that in certain instances requires them to decide between life and death.⁶⁷ Jurors falling into this category often “want to ‘solve’ the case,” and they think more information might help them.⁶⁸

The Ohio case of Ryan Widmer demonstrates how far some jurors will go to ensure that they make the right decision.⁶⁹ In that case, the defendant was charged with drowning his newlywed wife, Sarah, in the couple’s bathroom.⁷⁰ The defense claimed that Ryan found Sarah in the bathtub and immediately called 911 and started to perform CPR.⁷¹ However, emergency medical technicians (EMTs), who arrived on the scene shortly after being called, claimed that Sarah’s body was dry when they arrived, which supported the government’s theory that Ryan drowned his wife and then staged the 911 call.⁷² A key question in the case was whether a human body could dry between the time Ryan supposedly pulled his wife out of the bathtub and the time the EMTs arrived.⁷³ Several jurors were so concerned about this issue and possibly convicting an innocent man that, after deliberations ended on the first day, they went home, bathed, and then calculated the amount of time it took for their bodies to air-dry.⁷⁴

Another cause of juror research is confusion, which stems from a variety of factors.⁷⁵ First, some of the more modern

conducting their own research are the most conscientious ones, because they want all of the facts so they can make an informed decision about the case.”).

67. See Janice Morse, *Long Road Ahead in Widmer Case*, CINCINNATI ENQUIRER (May 22, 2009), <http://news.cincinnati.com/article/20090522/NEWS0107/905230364/Long-road-ahead-Widmer-case>; see also Gershman, *supra* note 32, at 347.

68. See Jury Survey, *supra* note 36.

69. See Morse, *supra* note 67.

70. *Id.*

71. See Dennis Murphy, *The Mystery in the Master Bedroom*, MSNBC (Sept. 18, 2009) http://www.msnbc.msn.com/id/32860588/ns/datetime_nbc-crime_reports/t/mystery-master-bedroom.

72. See *id.*

73. Morse, *supra* note 67.

74. *Id.* The actions of the jurors resulted in a new trial for the defendant. His second trial ended in a hung jury, and his third trial ended in a conviction. Janice Morse, *Jury Finds Ryan Widmer Guilty of Murder*, CINCINNATI ENQUIRER (Feb. 15, 2011), <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20110215/NEWS010702/302150035/&template=artiphone>.

75. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 553–54 (1997).

crimes that jurors must consider, such as violations of the Racketeer Influenced and Corrupt Organizations Act (RICO)⁷⁶ or securities fraud, go “well beyond the general knowledge of the layperson.”⁷⁷ Thus, jurors become reliant on the attorneys or the judge to explain the elements and charges. Unfortunately, both attorneys and judges sometimes fail to provide adequate explanations.

Second, some jurors are unclear about words and phrases used at trial that often go undefined by the attorneys or the judge.⁷⁸ Jurors have been discovered researching medical or legal terms like “oppositional defiant disorder”⁷⁹ and “distribution.”⁸⁰ In other instances, jurors have turned to the Internet to learn the definitions of uncommon words like “lividity.”⁸¹ The problem of juror confusion is compounded by the fact that many jurisdictions prevent jurors from discussing the case until deliberations and, even then, only with other jurors who may be equally as confused.⁸²

Besides being overly conscientious and confused about the facts at trial, some jurors are just plain curious.⁸³ Like most people, they want to know why certain issues went unexamined and why specific witnesses went uncalled.⁸⁴ Furthermore, jurors are interested in learning about evidence objected to or deemed inadmissible.⁸⁵ As one Jury Survey respondent noted, “They want to know all the things they think we are keeping from them.”⁸⁶

76. 18 U.S.C. §§ 1961–68 (2006).

77. See Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1189 (2008).

78. See Jerry Casey, *Juries Raise a Digital Ruckus*, OREGONIAN (Jan. 13, 2008), http://blog.oregonlive.com/washingtoncounty/2008/01/juries_raise_a_digital_ruckus.html.

79. Wardlaw v. State, 971 A.2d 331, 334 (Md. Ct. Spec. App. 2009).

80. United States v. Bristol-Mártir, 570 F.3d 29, 37 (1st Cir. 2009).

81. Del Quentin Wilber, *With Social Networking, Justice Not So Blind*, WASH. POST, Jan. 9, 2010, at C1.

82. See *infra* text accompanying notes 121–24.

83. See, e.g., Jeffrey T. Frederick, *You, the Jury, and the Internet*, BRIEF, Winter 2010, at 12, 12 (quoting a juror who explained his misconduct by stating, “Well, I was curious.”).

84. See Strutin, *supra* note 52 (“More powerful than any rule of courtroom conduct are human curiosity and the overwhelming need to share our experiences.”).

85. See Susan J. Silvernail, *Internet Surfing Jurors*, ALA. ASS'N FOR JUST. J., Fall 2008, at 49, 49 (“Judge Vowell says he has observed a change in juror’s [sic] attitudes about wanting more information about the cases.”).

86. Jury Survey, *supra* note 36.

2. Modern-Day Reasons for Juror Research

In addition to the traditional grounds for juror research, the Digital Age has created new opportunities and reasons for jurors to seek information outside of the courtroom. First, in the Digital Age, Internet usage has become increasingly common and popular.⁸⁷ As a result, more people have grown accustomed to and reliant on it.⁸⁸ In fact, “going online” to find information has become almost instinctive, something people do without giving it much thought.⁸⁹ For many, the customary preparation for, or follow-up after, meeting a new person, either professionally or socially, is to research that person by “Googling” or “Facebooking” him or her.⁹⁰ This practice does not necessarily cease because someone is serving as a juror. When jurors initially see the judge,⁹¹ parties,⁹² attorneys,⁹³ and witnesses,⁹⁴ they want to know more about these individuals, and, to do this, they go online to find information.

Second, the Internet makes research by jurors much easier to accomplish. According to one state bar journal, “Jurors have

87. For current information on the number of individuals using the Internet, see *Internet Usage Statistics: The Internet Big Picture*, INTERNET WORLD STATS, <http://internetworldstats.com/stats.htm> (last updated Oct. 6, 2011) (estimating that 78.3% of the North American population uses the Internet); see also Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking 2* (July 28, 2011) (unpublished presentation), available at <http://www.thefederation.org/documents/18.Juror%20Misconduct%20and%20Social%20Media-Kiernan.pdf>.

88. See Nora Lockwood Tooher, *Tackling Juror Internet Use*, LAWS. USA, Mar. 24, 2009 (“There’s a whole generation of people for whom twittering is as natural as breathing.”) (quoting litigation consultant Ken Broda-Bahm).

89. Michelle Lore, *Facing Down Facebook: Social Media Use and Juries*, MINN. LAW. (June 14, 2010), <http://minnlawyer.com/2010/06/14/facing-down-facebook-social-media-use-and-juries> (“I emphasize [that jurors should not investigate cases] because I think it’s almost becoming natural to [go to websites to] satisfy your curiosity and get answers.”) (second alteration in original) (quoting a judge); see also Ellen Lee, *Pew Survey: Half of Us Have Looked Up People We Know on Internet*, S.F. CHRON., Dec. 17, 2007, at E1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/17/BUKETSUFG.DTL> (“About half of the online adult population has looked up themselves or someone else online.”).

90. See Brickman et al., *supra* note 2, at 288 (“[M]any people automatically search the Internet when confronted with a new name, subject, idea or other stimulus.”).

91. Email Interview with Jake Durling (Nov. 10, 2011).

92. See *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009).

93. See Henry Gottlieb, *Should You Design Your Firm’s Web Site with Jurors in Mind?*, N.J. L.J., Jan. 2, 2007, at 29.

94. *Id.*

the capability instantaneously to . . . look up facts and information during breaks, at home, or even in the jury room.”⁹⁵ If a juror has a question about an issue that arose in court or wants to know more about where the alleged crime took place, she does not have to physically go to the library or crime scene.⁹⁶ Instead, she merely needs to access the Internet which, compared to other options, is quicker, less onerous, and less likely to be noticed.⁹⁷

The ease of obtaining information from the Internet has also led jurors to more readily seek out facts on their own.⁹⁸ This in turn has made jurors less deferential to the person offering information in court, whether she is the judge, attorney, or witness.⁹⁹ With the Internet, even a layperson can be an expert—at least for the moment.¹⁰⁰

Another reason for online juror research is the sheer number of news stories about trials, and the longer shelf-life of those stories. Today, even routine cases are now reported or

95. Artigliere et al., *supra* note 38, at 9; see also Eric Sinrod, *Jurors: Keep Your E-fingers to Yourselves*, TECHNOLOGIST (Sept. 15, 2009, 9:29 AM), <http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html> (“It is reasonable to expect that the natural curiosity of some jurors and the ease and habit of Internet research might cause them to let their fingers do their walking into finding out about their cases outside of the courtroom.”).

96. Erika Patrick, Comment, *Protecting the Defendant’s Right to a Fair Trial in the Information Age*, 15 CAP. DEF. J. 71, 87 (2002) (“Because the Internet is such a vast resource, the potential exists for jurors to do independent research on matters of law with more ease and stealth than going to the local law library would require.”).

97. See Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360 (Oct. 23, 2009, 4:18 PM), <http://www.law360.com/topnews/articles/128603> (paid subscription) (“[T]he sheer wealth of data available online makes it easier for [jurors] to look up arcane terms or dig up dirt on the parties.”).

98. See John G. Browning, *When All That Twitters Is Not Told: Dangers of the Online Juror (Part 3)*, LITIG. COUNS. AM. (Aug. 2009), <http://www.trialcounsel.org/082909/BROWNING.htm> (“As [an Oregon district attorney] puts it, the ease of the Internet and handheld technology ‘almost invite people to do extrinsic research . . .’”).

99. Renee Loth, Op-Ed., *Mistrial by Google*, BOS. GLOBE, Nov. 6, 2009, at A15, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/06/mistrial_by_google.

100. See Rebecca Porter, *Texts and ‘Tweets’ by Jurors, Lawyers Pose Courtroom Conundrums*, TRIAL, Aug. 2009, at 12, 14 (“Some have a compulsion to know and be viewed as an expert. In the privacy of their own homes at 2 a.m., they do whatever they want.”) (quoting jury consultant Amy Singer); see also Strutin, *supra* note 52 (“Our Internet culture has enlarged the knowledge base of anyone with a smartphone.”).

discussed on the Internet.¹⁰¹ Also, unlike in the past, information on the Internet about the trial or parties does not necessarily go away just because the case is out of the news cycle of the traditional media. This was noted by several legal commentators who wrote that a “year-old article in an out-of-state publication will show up in an Internet search just as easily as a current headline from the daily local paper.”¹⁰²

Finally, some jurors unwittingly conduct research because the jury instructions are either unclear or outdated. For example, in *Russo v. Takata Corp.*, a juror named Flynn received a jury summons that stated, “Do not *seek out evidence* regarding this case and do not discuss the case or this Questionnaire with anyone.”¹⁰³ Flynn “did not recognize Takata by name or product line and wondered ‘what they did.’”¹⁰⁴ Flynn also wanted to know if Takata had been involved in any previous lawsuits.¹⁰⁵ Thus, he went online to investigate the company.¹⁰⁶

Flynn’s online research never came out during voir dire because the attorneys handling the case did not directly raise the topic with Flynn.¹⁰⁷ Later, however, during deliberations, Flynn told another juror that during his Internet research of Takata he did not find any lawsuits against the company.¹⁰⁸ Shortly after reaching a verdict in favor of the defendants, Flynn’s actions were uncovered, and the trial judge granted the plaintiff’s motion for a mistrial based on juror misconduct.¹⁰⁹ The defendants appealed to the South Dakota Supreme Court, which affirmed the actions of the trial judge and also stated that “[i]t may well be that Flynn did not realize that performing a Google Search on the names of the Defendants Takata and TK Holdings constituted ‘seek[ing] out evidence.’”¹¹⁰

101. Brickman et al., *supra* note 2, at 292 (“Virtually every trial is newsworthy to someone and can therefore end up on the Internet where jurors can easily find it.”).

102. *Id.*

103. *Russo v. Takata Corp.*, 774 N.W.2d 441, 444 (S.D. 2009) (emphasis added).

104. *Id.*

105. *See id.* at 446.

106. *Id.*

107. *See id.* at 445.

108. *Id.* at 446.

109. *Id.* at 447.

110. *Id.* at 450 n.* (second alteration in original).

Unfortunately, the negative impact of the Digital Age on jurors is not limited to online juror research. Juror communications, which will be discussed in greater detail below, has also become a major area of concern in the Digital Age.¹¹¹

B. Communications

For the purposes of this Article, juror communications occur either among jurors themselves or with outside third parties. Generally speaking, communications by a juror are not an issue if they are unrelated to the trial on which the juror sits.¹¹² But if the communications relate to the trial, problems can arise. This is because most jurisdictions forbid jurors from discussing trial evidence with other jurors prior to deliberations and with non-jurors before reaching a verdict.¹¹³ Yet, as with the prohibition on juror research, the restrictions on juror communications are not always followed.

1. Juror-to-Juror Communications

Traditionally, juror communications with third parties have raised more concerns than juror communications with other jurors.¹¹⁴ In fact, some reformers want to allow jurors to discuss the case among themselves prior to the commencement of deliberations.¹¹⁵ Currently, at least four states allow jurors in civil proceedings to discuss the case before the submission of

111. See DiCosmo, *supra* note 66 (“Society’s increasing dependence on cell phones, smart phones and social networking sites such as Facebook and Twitter to stay in contact can pose a problem for court officials when it comes to keeping jurors from communicating during a case.”).

112. For a twist on this general rule, see Pablo Lopez, *Juror E-mails Muddy Trial*, MCCLATCHY (Apr. 16, 2010), <http://www.mcclatchydc.com/2010/04/16/92318/juror-e-mails-muddy-trial.html>. This article discusses a California judge who, upon being selected to serve as a juror, sent emails about his experience to his fellow jurists. “[L]egal observers say it’s not clear that [Judge] Oppliger did anything wrong. Jurors are allowed to tell others they are assigned to a trial. But the judge should have known better than to do something that could raise a possible objection, they say.” *Id.*

113. David A. Anderson, *Let Jurors Talk: Authorizing Pre-deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92, 94–95 (2002).

114. Gershman, *supra* note 32, at 341 (“External influences completely evade the safeguards of the judicial process, whereas internal violations do not raise the fear that the jury based its decision on reasons other than the trial evidence.”).

115. See Anderson, *supra* note 113, at 123–24.

all evidence.¹¹⁶ Other jurisdictions are considering or experimenting with the idea for criminal trials.¹¹⁷

Advocates of pre-deliberation discussions argue that they improve juror comprehension and focus the jury once deliberations commence.¹¹⁸ In addition, these proponents believe that it is naïve and unrealistic to think that jurors will refrain from discussing the trial with anyone until deliberations.¹¹⁹ “[T]he urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of juror.”¹²⁰ Thus, to those supporting juror pre-deliberation discussions, it is better that jurors talk with fellow jurors as opposed to family members or other improper third parties.

Nevertheless, most jurisdictions prohibit jurors from talking about the case with other jurors prior to deliberations.¹²¹ This rule is in place in order to (1) prevent premature judgments, (2) increase flexibility during deliberations, (3) ensure quality and broad deliberations, (4) decrease juror stress, and (5) maintain open-mindedness.¹²² A strong belief exists, especially among the defense bar in both civil and criminal matters, that allowing jurors to discuss the case prior to deliberations puts defendants at a decided disadvantage, as they have yet to present their evidence.¹²³ Some also fear that discussions prior to deliberations might

116. These states include Arizona, Indiana, Michigan, and North Dakota. See Jessica L. Bregant, Note, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. ILL. L. REV. 1213, 1215 & n.19; Joe Swickard, *Michigan Jurors to Get More Leeway Under New Rules*, DETROIT FREE PRESS, June 29, 2011.

117. William J. Caprathe, *A Jury Reform Pilot Project: The Michigan Experience*, JUDGES' J., Winter 2009, at 27, 30–31.

118. THE ARIZ. SUPREME COURT COMM. ON THE MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12—PART TWO 8–9 (1998) [hereinafter JURORS: THE POWER OF 12], available at <http://www.azcourts.gov/Portals/15/Jury/Jury12.pdf>.

119. *Id.*

120. Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 408 (1994) (citing jury expert Hans Zeisel).

121. For a discussion of the constitutional implications of banning juror speech, see *id.* at 409–14.

122. Anderson, *supra* note 113, at 95.

123. See Danielle Salisbury, *Lawyers, Judges Doubt Jury Reform Will Fundamentally Change the Way Courts Operate*, MLIVE.COM (Aug 13, 2011), http://www.mlive.com/news/jackson/index.ssf/2011/08/lawyers_judges_doubt_jury_refo.html.

occur outside the jury room and without the presence of all twelve jurors.¹²⁴

Historically, the issue of jurors communicating with one another before deliberations received little attention because most courts viewed it as low-level or minor misconduct.¹²⁵ Although jurors in the past might talk about the case with each other while leaving the courthouse or discuss it during breaks in the trial, these discussions were uncommon occurrences and not considered grave breaches of a juror's duty.¹²⁶ Thus, for the most part, courts were hesitant to declare a mistrial based solely on jurors discussing the case before deliberations.¹²⁷ This was especially true if the juror-to-juror communications did not occur in the presence of third parties.¹²⁸

The difference today is the impact of technology. Jurors can now communicate with each other via email and social networking sites. For example, in the corruption trial of former Baltimore Mayor Sheila Dixon, several jurors kept in contact during and after the trial via Facebook despite admonitions by the judge not to do so.¹²⁹

These new forms of juror-to-juror communications greatly increase the possibility that the interactions and discussions of jurors will occur outside of the jury room and be made available to third parties. For example, if conducted in an online forum, these communications can provide the general public—including the parties trying the case—access to the inner workings of the jury room and privileged information, such as informal vote counts or details of closed-door deliberations. In the Dixon case, the defense attorneys were able to read the Facebook posts of the jurors.¹³⁰ This jeopardized not only jury

124. See Anderson, *supra* note 113, at 105–06.

125. NANCY S. MARDER, *THE JURY PROCESS* 114 (2005) (“Most courts turn a blind eye to the fact that jurors do engage in predeliberation discussions.”).

126. *Id.*

127. *Id.*

128. See B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996) (discussing the Supreme Court's concern about “division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury”).

129. See *Dixon Jurors Ignore Judge, Continue Facebook Posts*, WBAL-TV (Jan. 4, 2010, 8:34 AM), <http://www.wbalv.com/r/22117438/detail.html>; *Dixon Jurors Must Testify About Facebook*, UNITED PRESS INT'L (Dec. 30, 2009, 2:37 PM), http://www.upi.com/Top_News/US/2009/12/30/Dixon-jurors-must-testify-about-Facebook/UPI-75451262201840.

130. Brendan Kearney, *Friends on Jury*, DAILY REC., Dec. 3, 2009, at A1.

deliberations but also the integrity of the legal system itself.¹³¹ These new methods of communication also demonstrate how juror-to-juror communications can easily and unintentionally become communications to third parties—a much more problematic issue.

2. Juror-to-Non-juror Communications

While strong arguments exist both for and against allowing jurors to discuss the trial prior to deliberations with each other,¹³² few, if any, would suggest that jurors be allowed to communicate with third parties about the trial prior to verdict. Yet, despite this uniform disapproval, this communication still happens. Of late, the method of juror-to-third-party contact receiving the greatest amount of attention is online communication.¹³³

For a variety of reasons, courts want to limit juror communications to third parties until a verdict is reached. First, there is concern about maintaining the confidentiality of jury deliberations.¹³⁴ Having jurors post information online about ongoing deliberations or other jurors would hinder the traditional method of juror decision-making.¹³⁵ For example, some jurors may not fully participate or might hold back their

131. See Winkler, *supra* note 25 (“One of the cases . . . involving Twitter demonstrates the potential for stock price manipulation if jurors tweet that a company is losing a big lawsuit. It also facilitates jury manipulation, if lawyers or other interested parties tweet back or learn how individual jurors are leaning.”).

132. See Anderson, *supra* note 113, at 121–23.

133. See, e.g., Douglass L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, JURY EXPERT, Nov. 2009, at 14; Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct: What Happens Behind Closed Doors*, 62 ALA. L. REV. 623, 638 (2011) (“The fastest developing area in the realm of juror misconduct involves juror use of e-mail, social networking sites such as Facebook, and micro-blogging sites such as Twitter during trial.”).

134. See *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997); Strauss, *supra* note 120, at 403 (“This frank and open exchange by jurors, moreover, is critical to the effectiveness of the decisionmaking process.”); see also John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC’Y 166, 170 (1929) (“The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.”).

135. See *Clark v. United States*, 289 U.S. 1, 13 (1933) (“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”).

true feelings during deliberations if they know that their views will end up on the Internet.¹³⁶

Second, juror communications to third parties undermine the notions of due process and a fair trial by providing attorneys with “inside information” into juror decision-making. Consider this real-life scenario involving a juror in Michigan. At the conclusion of the first day of a two-day criminal trial, a sitting juror posted the following on her Facebook account: “[A]ctually excited for jury duty tomorrow. It’s gonna be fun to tell the defendant they’re GUILTY. :P.”¹³⁷ The Facebook post was discovered by defense counsel’s son, who was running Internet searches on the jurors.¹³⁸ The defense attorney reported the juror, who was removed prior to the start of the second day of trial.¹³⁹

However, it is not difficult to envision a different outcome had the prosecutor discovered the information. Also, a different defense attorney may have taken an alternative approach to this problem. Some attorneys might wait for an unfavorable verdict to reveal the Facebook post.¹⁴⁰ Other attorneys might not report the Facebook post at all and instead approach the prosecutor about a mid-trial plea deal or use the information to revamp their trial strategy.¹⁴¹ As will be discussed in Part II,

136. See Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889–90 (1983) (“Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.”) (footnotes omitted).

137. Jameson Cook, *Facebook Post Is Trouble for Juror*, MACOMB DAILY (Aug. 28, 2010), <http://macombdaily.com/articles/2010/08/28/news/doc4c79c743c66e8112001724.txt?viewmode=fullstory>; see also Associated Press, *Juror Who Blurted out Verdict on Facebook Fined \$250, Ordered to Write Essay*, CLEVELAND.COM (Sept. 2, 2010), http://www.cleveland.com/nation/index.ssf/2010/09/juror_who_blurted_out_verdict.html.

138. *Id.*

139. *Id.*

140. Correy Stephenson, *Should Lawyers Monitor Jurors Online?*, LEGALNEWS.COM (Dec. 27, 2010), <http://www.legalnews.com/macomb/1004089> (noting that a lawyer “expressed concern that some attorneys might fail to disclose information they learn about a juror—keeping it in ‘their back pocket’ in case of an unfavorable verdict—and then use the information to seek a new trial”).

141. Richard L. Moskitis, Note, *The Constitutional Need for Discovery of Prevoir Dire Juror Studies*, 49 S. CAL. L. REV. 597, 626 (1976) (“When both the prosecution and the defense can resist discovery of juror information, it is possible

information about jurors is rarely subject to the rules of discovery, and attorneys have a very limited ethical duty to report it to the court.

The final concern with juror-to-non-juror communication is that the juror, by communicating with an outside party about the trial, increases the likelihood that the third party will influence the juror's views.¹⁴² This is because most communications involve an exchange of words or ideas. This concept is reflected in *People v. Jamison*, where the court explained why communications between a juror and a third party are restricted: "[T]he real evil the Court's instruction not to discuss the case was designed to avoid . . . [was] the introduction of an outside influence into the deliberative process, either through information about the case or another person's agreement or disagreement with the juror's own statements"¹⁴³ Juror online communication to a third party, however, is somewhat different in that, depending on how it occurs, the juror may or may not receive feedback. For example, a Facebook post or a tweet on Twitter does not always garner a response.

To date, the United States Supreme Court has not addressed the issue of individuals making online comments while serving as jurors. However, several state supreme courts and lower federal courts have taken up the topic. One of the first to do so was the Supreme Judicial Court of Massachusetts in *Commonwealth v. Guisti*. In *Guisti*, the defendant was convicted of several serious sex-related crimes.¹⁴⁴ During the defendant's trial, one of the jurors sent an email to a 900-person LISTSERV and received at least two responses from individuals on the LISTSERV.¹⁴⁵ The juror's email read: "[S]tuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and

for members of the community to view the result of the trial as dependent upon which side enjoyed the advantage of juror information rather than upon impartial jury deliberations").

142. See *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) ("Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence.").

143. *People v. Jamison*, No. 8042/06, 2009 WL 2568740, at *5 (N.Y. Sup. Ct. Aug. 18, 2009).

144. *Commonwealth v. Guisti*, 747 N.E.2d 673, 675 (Mass. 2001).

145. *Id.* at 678.

getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!"¹⁴⁶ Shortly after the verdict, defense counsel learned of the email and filed a motion for post-verdict voir dire of the juror in question.¹⁴⁷ The trial court denied this motion, and defense counsel appealed, claiming that the defendant's Sixth Amendment right to a fair trial had been violated.¹⁴⁸

In reviewing the defendant's appeal, the Massachusetts Supreme Court initially remanded the case to the lower court.¹⁴⁹ However, it did not do so because of the email, which the court found to be "improper" and in violation of "the judge's order not to communicate about the case."¹⁵⁰ Rather, the court remanded the case because of the responses the juror had received from those on the LISTSERV.¹⁵¹ The Supreme Judicial Court wanted the trial court to determine whether these responses constituted external influences.¹⁵² Upon remand and voir dire of the juror, the trial court ultimately determined that the responses from the LISTSERV were not improper external influences.¹⁵³

Goupil v. Cattell was another case that addressed the issue of improper online communications by a juror.¹⁵⁴ Like *Guisti*, *Goupil* involved a defendant convicted of a serious sex-related crime.¹⁵⁵ However, unlike *Guisti*, the improper method of juror communication in *Goupil* was a blog post, not an email.¹⁵⁶ Another distinguishing feature of *Goupil* is that the trial judge conducted a post-trial voir dire shortly after becoming aware of the juror's blog posts rather than waiting until he was directed to do so by the appellate court.¹⁵⁷

In *Goupil*, the juror's first questionable post, made prior to voir dire, was as follows: "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I

146. *Id.* (second and third alterations in original).

147. *Id.*

148. *Id.* at 678–79.

149. *Id.* at 681.

150. *Id.* at 680.

151. *Id.*

152. *See* Commonwealth v. Guisti, 867 N.E.2d 740, 742 (Mass. 2007).

153. *Id.*

154. *Goupil v. Cattell*, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).

155. *Id.* at *1.

156. *Id.*

157. *Id.* at *3.

get to listen to the local riff-raff try and convince me of their innocence.”¹⁵⁸ In another post, made after voir dire but prior to the start of trial, the juror, who happened to be the foreman, wrote, “After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc.”¹⁵⁹

The defendant in *Goupil* argued on appeal that the juror’s blog constituted prejudicial extrinsic communication with a third party and that the juror was personally biased against the defendant.¹⁶⁰ In upholding the defendant’s conviction, the federal court noted the state trial court’s extensive post-trial voir dire.¹⁶¹ During this voir dire, the trial court determined that no other juror read the blog or was even aware of its existence.¹⁶² The trial court also found that the blog posts did not discuss the defendant’s case specifically and that the juror did not demonstrate any pre-trial bias.¹⁶³ The court also analogized the blog to “a personal journal or diary, albeit one that the author publishes to the Web and permits others to read.”¹⁶⁴ The court stated that the defendant “surely would not claim that the diary constitutes an ‘extraneous communication’ with third parties of the sort that gives rise to a presumption of prejudice.”¹⁶⁵

As these cases illustrate, courts are less likely to disturb the ultimate verdict because of a juror’s online comments absent the presence of one of the following factors: (1) the juror discussed details of the trial, (2) the juror demonstrated a pre-trial bias, (3) other jurors saw the information, (4) the posts revealed that the juror was considering facts not admitted into

158. *Id.* at *2.

159. *Id.*

160. *Id.* at *5–6.

161. *Id.* at *8.

162. *Id.* at *7.

163. *Id.* at *8. The court noted:

The fact that Juror 2 might have come to the criminal justice process with preconceived notions about the “local riff-raff” and even a mistaken understanding of which party bears the burden of proof in a criminal trial is, in this case, of little moment. . . . [T]he [trial] court reasonably and sustainably concluded that: (1) Juror 2’s comments did not relate to [the defendant’s] trial; [and] (2) Juror 2 understood the presumption of innocence

Id. at *10.

164. *Id.* at *7.

165. *Id.*

evidence, or (5) a third party contacted the juror about her comments.¹⁶⁶

3. Reasons for Improper Juror Communications

In some respects, the reasons for improper juror communications and research are similar. Like juror research, some juror communications occur because of a misunderstanding of the judge's instructions.¹⁶⁷ In *State v. Dellinger*, a West Virginia juror never told the trial judge that she interacted with the defendant via MySpace despite being asked during voir dire whether she knew the defendant.¹⁶⁸ When the defendant's conviction was later overturned because of the juror's lack of candor, the court asked the juror why she did not reveal that she knew the defendant and had interacted with him on MySpace.¹⁶⁹ According to the juror:

I just didn't feel like I really knew him. I didn't know him personally. I've never, never talked to him. And I just felt like, you know, when [the trial judge] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. . . . I knew in my heart that I didn't know him. . . . [M]aybe I should have at least said that, you know, that he was on MySpace, which really isn't that important, I didn't think.¹⁷⁰

Many jurors also do not consider or realize that texting, emailing, tweeting, and blogging are prohibited forms of

166. Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings*, LAW TECH. NEWS (May 13, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430647333&slreturn=1&hbxlogin=1> (paid subscription) ("When jurors blog about ongoing trials, there are several key considerations: Did the jurors discuss details of the trial? Did the jurors display a pretrial bias for or against one party? Did fellow sitting jurors read the blog or electronic communication during the trial and thus become unduly influenced?").

167. Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, ARIZ. ATT'Y, Feb. 2010, at 38, 39 ("It seems, however, that many jurors do not see blogging, tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions.").

168. *State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2010).

169. *Id.* at 41.

170. *Id.*

communication.¹⁷¹ Noted juror expert Paula Hannaford-Agor points out that, “For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication.”¹⁷² Not surprisingly, then, jurors continue to communicate with other jurors (prior to deliberations) and with outside parties (prior to the verdict) despite admonitions from judges.¹⁷³

Also, as with online research, some jurors violate the rules on prohibited communications because they have grown attached to the technological advancements brought by the Digital Age.¹⁷⁴ For these jurors, going any extended period of time without communicating via a social media website, text, tweet, or blog is a challenge.¹⁷⁵ This desire for constant contact is so strong that it can almost be categorized as an “addiction”—one that they cannot give up even when called to serve on a jury.¹⁷⁶ Jurors falling into this category are more likely to discuss the case with others.¹⁷⁷

171. Allison, *supra* note 97 (“It may seem obvious that you shouldn’t broadcast your juror experience live on Twitter, but even sophisticated people need reminders.”).

172. Hannaford-Agor, *supra* note 60, at 43.

173. Even some lawyers and judges have difficulty understanding the concept. For example, one lawyer-juror thought that he could blog about a case he was sitting on: “Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial.” *Attorney Discipline*, CAL. B.J. (Aug. 2009), <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=2009>.

174. See Jerold S. Solovy & Robert L. Byman, *Confronting the Fact of Juror Research*, LAW TECH. NEWS (Nov. 30, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435852040> (paid subscription) (“[W]e cell phone abusers, we internet junkies, we believe it is our God-given right to be connected.”).

175. See Anita Ramasastry, *Why Courts Need to Ban Jurors’ Electronic Communications Devices*, FINDLAW (Aug. 11, 2009), <http://writ.news.findlaw.com/ramasastry/20090811.html> (“Citizens have become increasingly reliant on such devices and applications. Indeed, many use them incessantly, as a lifeline to their friends, relatives, and colleagues—especially when they are at meetings, conferences, or otherwise away from their normal office or home routines.”).

176. See McGee, *supra* note 28, at 310; Susan Macpherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, Nov. 2010, at 40, 42 (“[A]ddiction to Internet access is not limited to young jurors.”).

177. Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621, 639–40 (2011) (“To some jurors, the cell phone, iPad, notebook, or other digital device is a lifeline to which they feel addicted. These jurors require constant communication with others on events and matters from the mundane to the critical.”); see also Cassandra Jowett, *‘Google Mistrials’ Derail Courts; Critics Say System Ignores Impact of New Technology*, NAT’L POST, Mar. 23, 2009, at A1 (“The

Finally, in other respects, the reasons behind improper juror communications are completely different from online research. For example, some, like the jury foreman in *Goupil*, feel the need to constantly chronicle their daily activities to the general public.¹⁷⁸ This desire by the so-called “Tell-All Generation” to put their lives on display to the world is not shed just because they are called to serve on juries.¹⁷⁹ Rather, this change in daily routine may actually increase the appeal to reveal¹⁸⁰ because jury duty “can in its own strange way be an escape from the usual rhythms of city life.”¹⁸¹

Regardless of whether the rationale behind improper juror communications is similar or dissimilar to juror research, one thing is certain: The Digital Age has had a significant influence on juror behavior. With respect to juror research, the impact has been almost entirely negative. Save for the opportunity to become more like grand jurors,¹⁸² few positive attributes arise from providing jurors with better methods by which to conduct research. Arguably, even the staunchest advocates of the so-called “Active Jury”¹⁸³ would deem research by jurors detrimental to the legal process.

modern addiction to instant communication appears to have given rise to the ‘Google mistrial’—the use of new technology to inadvertently skew the scales of justice.”).

178. Artigliere et al., *supra* note 38, at 9 (“Some jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers.”).

179. See Laura M. Holson, *Tell-All Generation Learns to Keep Things Offline*, N.Y. TIMES, May 8, 2010, at A1, available at <http://www.nytimes.com/2010/05/09/fashion/09privacy.html> (arguing that, according to conventional wisdom, “everyone under 30 is comfortable revealing every facet of their lives online, from their favorite pizza to most frequent sexual partners”).

180. Michael Bromby, *The Temptation to Tweet—Jurors’ Activities Outside the Trial* (Mar. 26, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (describing one of the few studies to track Twitter comments by jurors and prospective jurors). For examples of celebrities tweeting about their jury experiences, see *Live from the Jury Box, It’s Steve Martin!*, ZIMBIO (Dec. 22, 2010, 12:53 PM), <http://www.zimbio.com/Steve+Martin/articles/1StTKdTeaji/Live+jury+box+Steve+Martin>, and Debra Cassens Weiss, *Media Atwitter over Al Roker’s Twitter Photos from Jury Duty Wait*, A.B.A. J. (May 29, 2009, 9:08 AM), http://www.abajournal.com/news/article/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait.

181. Ariel Kaminer, *The Torturous Trials of the Idle Juror*, N.Y. TIMES, Oct. 1, 2010, at MB1, available at <http://www.nytimes.com/2010/10/03/nyregion/03critic.html>.

182. See generally Hoffmeister, *supra* note 77.

183. Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 219–20 (1990). Active juries are generally

In contrast, there is a growing trend in the United States to allow jurors, prior to the close of trial, to discuss among themselves evidence introduced in court.¹⁸⁴ For those who support juror-to-juror communications prior to deliberations, the Digital Age—with its smart phones, blogs, and social media websites—is a boon because it facilitates this practice. As for jurors discussing the case with third parties prior to the verdict, little can be said in support of this activity. Similar to juror research, it should not occur, and the technological advancements that support this practice are a detriment to the legal system.

The next portion of this Article, Part II, will discuss four possible remedies to address the problems raised in Part I. The proposed solutions are as follows: (1) imposing penalties on jurors, (2) investigating jurors, (3) allowing juror questions, and (4) improving jury instructions. These remedies take various approaches in regulating juror behavior. The first two rely on punishment and oversight, while the last two use empowerment and education.¹⁸⁵

II. POSSIBLE SOLUTIONS

A. *Imposing Penalties*

The first remedy analyzed in this Article is juror penalties, which can take various forms that range from fines¹⁸⁶ to public

described as those that are more engaged in the trial process and allowed to ask questions, take notes, and bring the instructions or transcripts back to the jury room. Jannessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1011–12 (1996).

184. See Anderson, *supra* note 113, at 92.

185. See Hannaford-Agor, *supra* note 60, at 43 (“Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.”).

186. See, e.g., Andria Simmons, *Georgia Courts to Bar Jurors from Internet*, ATLANTA J.-CONST. (Mar. 30, 2010, 6:54 PM), <http://www.ajc.com/news/georgia-courts-to-bar-420308.html>. Also, if fines are indeed used, the court should consider imposing *day fines*, which “are based on an elementary concept: ‘punishment by a fine that should be proportionate to the seriousness of the offense and should have roughly similar impact (in terms of economic sting) on persons with differing financial resources who are convicted of the same offense.’” John W. Clark et al., *Social Networking and the Contemporary Juror*, 47 CRIM. L. BULL. 83, 91–92 (2011) (quoting BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 1 (1996), available at <https://www.ncjrs.gov/pdffiles/156242.pdf>).

embarrassment¹⁸⁷ to sequestration.¹⁸⁸ The common theme with all penalties is that once imposed, they make citizens less inclined to want to serve as jurors.¹⁸⁹ The average individual views jury duty as a burden that pulls so-called “citizen volunteers” away from their jobs, families, and friends to perform a sometimes stressful, and other times mundane, civic duty for which they receive minimal pay, if any at all.¹⁹⁰ In fact, it is quite common for individuals to think of excuses, real or imagined, to get out of serving jury duty.¹⁹¹ Once jurors realize that, in addition to the possibility of sequestration, they run the risk of being penalized, the incentive to avoid jury duty will only increase.¹⁹² Therefore, penalties should be a last resort in preventing juror misconduct.

1. Contempt

Contempt is one of the more common penalties for jurors who violate court rules.¹⁹³ Once imposed, it allows the court to fine the juror.¹⁹⁴ To date, at least one state (California) has increased its civil and criminal contempt penalties to address juror misconduct in the Digital Age. The recently enacted California law allows “punishment of jurors who electronically discuss confidential legal proceedings.”¹⁹⁵ According to the

187. See, e.g., Ed White, *Judge Punishes Michigan Juror for Facebook Post*, YAHOO! NEWS (Sept. 2, 2010), <http://news.yahoo.com/judge-punishes-michigan-juror-facebook-post.html>.

188. See *infra* Part II.A.3.

189. See Brian Grow, *Juror Could Face Charges for Online Research*, REUTERS (Jan. 19, 2011, 1:11 PM), <http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KI20110119> (“But penalties could also increase resistance to serving on juries. ‘It’s a Catch-22 for judges,’ said Thaddeus Hoffmeister . . .”).

190. According to one Jury Survey respondent, “Because jurors are citizen volunteers, the least invasive approach should be used until proven ineffective.” Jury Survey, *supra* note 36.

191. King, *supra* note 32, at 2704.

192. David P. Goldstein, Note, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 601 (2011) (“With the knowledge that they could face fines or even prosecution for something as innocuous as updating a Facebook status or sending Twitter messages, people may go even further out of their way to avoid jury duty.”).

193. “Contempt” refers to “[c]onduct that defies the authority or dignity of a court or legislature.” BLACK’S LAW DICTIONARY 360 (9th ed. 2009).

194. See *id.*

195. Cheryl Miller, *New Bill Targets Web-Surfing Jurors*, RECORDER, Feb. 22, 2010, at 1.

legislative director of the assemblyman who introduced the initial bill, "It's really just the law catching up with technology when it comes to the sanctity of the jury room."¹⁹⁶

Prior to exercising its contempt authority, a court should first determine why a juror violated the court's rules.¹⁹⁷ Jurors violate court rules for a variety of reasons.¹⁹⁸ Some do it intentionally; others do it unintentionally. Some do it for personal gain; others do it in a misguided effort to better fulfill their duties as jurors. To discover the juror's motivation for violating the court's instructions, the trial judge should directly ask the juror. In most instances, the juror will be quite candid with the court.¹⁹⁹ Many jurors openly state that they disregarded the court's rules because of curiosity²⁰⁰ or a misinterpretation of the judge's instructions.²⁰¹ In those cases where the juror is not forthcoming or the court questions the juror's credibility, the court should examine the context of the juror's actions.

After determining the reasons behind the juror's conduct, the court should then decide whether a contempt sanction will prevent similar behavior in the future. For example, holding a juror in contempt for misinterpreting jury instructions may not curb similar behavior in the future. However, if the juror did fully comprehend the jury instructions but disregarded them anyway because she wanted to be the first to reveal information about the case on her blog, the court may want to consider sanctions. Finally, the court should weigh the long-term impact of penalties on the legal system—one that needs citizen participation to effectively operate.

196. *Id.*; see also Eric P. Robinson, *New California Law Prohibits Jurors' Social Media Use*, CITIZEN MEDIA L. PROJECT (Sept. 15, 2011), <http://www.citmedialaw.org/blog/2011/new-california-law-prohibits-jurors-social-media-use>.

197. For a good discussion of when to hold a juror in contempt for violating the court's prohibitions against conducting research, see Superior Court of N.J., *In the Matter of Lawrence Toppin*, LAW OFF. DONALD D. VANARELLI (Oct. 11, 2011), <http://www.dvanarelli.com/blog/wp-content/uploads/2011/10/Matter-of-Lawrence-Toppin.pdf>.

198. See *supra* Parts I.A.1–2, I.B.2.

199. See *supra* Part I.A.

200. See Frederick, *supra* note 83 and accompanying text.

201. See, e.g., *Russo v. Takata Corp.*, 774 N.W.2d 441, 450 n.* (S.D. 2009).

2. The “Luddite Solution”²⁰²

Besides contempt proceedings, the court may also penalize jurors by depriving them of the tools they need to conduct research or communicate with third parties. At present, a number of jurisdictions across the country restrict juror access to cell phones and the Internet.²⁰³ This so-called Luddite Solution, which was noted by several Jury Survey respondents,²⁰⁴ can take a variety of forms. Some courts do not allow jurors to enter the courthouse with any electronic communication devices.²⁰⁵ Other courts impose restrictions only during deliberations.²⁰⁶

The latter policy appears to make more sense than the former for two reasons. First, depriving jurors of their electronic communication devices for an entire day can constitute a significant hardship and make jurors feel as though they are being controlled.²⁰⁷ Second, it creates a logistical problem for the court, which becomes responsible for ensuring that jurors have alternative forms of communication and can be reached by family members, friends, and employers. Both policies, however, lose effectiveness with trials lasting beyond one day. This is because jurors can simply wait until they get home to violate the judge’s instructions.²⁰⁸

202. “Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool.” The Honorable Dennis M. Sweeney, Circuit Court Judge (Retired), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials—Lessons Learned from the Dixon Trial 3 (Apr. 29, 2010) (transcript available at <http://juries.typepad.com/files/judge-sweeney.doc>).

203. See, e.g., Jury Survey, *supra* note 36 (“In the CD of Illinois jurors are not allowed to bring cell phones into the courtroom.”; “We take up their cell phones at the door.”). See generally Eric P. Robinson, *Jury Instructions for the Modern Era: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J., 307 (2011).

204. See Jury Survey, *supra* note 36.

205. *Id.*

206. See *id.* (“I require them to surrender cell phones and other such devices when they retire to deliberate.”).

207. Goldstein, *supra* note 192, at 602 n.108.

208. Allison, *supra* note 97 (“Courts can also ban mobile devices from the courtroom—some already do—though there could be some backlash from jurors accustomed to being in constant communication with family and friends. And that still doesn’t keep them from doing research on Google or tweeting when they get home.”).

Compared to the traditional methods used to prevent juror misconduct, the Luddite Solution appears to be extreme and an overreaction to the problems presented by online research and communications. For example, courts do not routinely deprive jurors of their radios and televisions even though these devices might be used to learn information about the case.²⁰⁹ Instead, jurors simply are told to avoid watching or listening to programs about the trial on which they sit.²¹⁰ Even in rare instances of sequestration, jurors are not necessarily deprived of access to the radio or television.²¹¹ Thus, jurors should not be deprived of their laptops and smartphones but rather should be instructed that neither is to be used to research the case or to discuss it.²¹²

209. See ADMIN. OFFICE OF THE ILL. COURTS, A HANDBOOK FOR ILLINOIS JURORS: PETIT JURY (2011), available at <http://www.state.il.us/court/circuitcourt/Jury/Jury.pdf> ("YOU SHOULD AVOID NEWSPAPERS OR RADIO AND TELEVISION BROADCASTS which may feature accounts of the trial or information about someone's participation in it.").

210. Robert Little, *Their Holiday Task: Don't Talk or Listen*, BALT. SUN (Nov. 26, 2009), http://articles.baltimoresun.com/2009-11-26/news/bal-md.jurors26nov26_1_pressure-benefit-jurors-informal-vote-counts ("The judge implored the panel to stay away from newspapers, television broadcasts and idle Dixon-related chatter, but few courtroom observers could imagine 12 people spending the next four days in Baltimore without encountering at least a whiff of the criminal case against the city's mayor.").

211. See Thaddeus Hoffmeister, *Lifetime Off Limits for Casey Anthony Juries?*, JURIES (Apr. 6, 2011), <http://juries.typepad.com/juries/2011/04/lifetime-off-limits-for-casey-anthony-jurors.html>.

212. See *Public Hearing Before the Mich. Supreme Court* 34 (2009) (statement of Robert P. Young, J.), available at <http://www.courts.michigan.gov/supremecourt/resources/administrative/PublicHearings/051209-PublicHearingTranscript.pdf>. Justice Young stated:

I have a theory about technology. We oughtn't impose on technology more than we impose on similar activities we conduct without technology. . . . [W]e used to have newspapers, we used to tell people not to read them. We have television[s]—we used to tell people not to listen to them. So . . . why would we do more than instruct jurors that [they] may not use this newer technology to do research in the same way that they could do if . . . prior to the time we had Blackberrys and PDAs[,] they could have gone to the library and done this research. . . . I'm struggling to understand why just because we now have the availability of a library in our hands we should be doing more than saying you may not use that library whether it's at a physical location somewhere other than the court or you can bring it in on a PDA.

Id.

3. Sequestration

Of the possible remedies available, sequestration best ensures juror compliance. This is because the court has direct control of the jurors' environment. While popular in the past and still relied upon in some jurisdictions for high-profile and capital trials, sequestration is not widely used today.²¹³ Despite this fact, some believe that sequestration, because of its deterrent effect, should be mentioned to all jurors upon initial empanelment.²¹⁴

Sequestration is generally disfavored because of the burden it places on courts and jurors.²¹⁵ It is expensive for a court to lodge jurors throughout a trial.²¹⁶ At present, courts are struggling to pay the nominal fee given to jurors for their service.²¹⁷ Additional costs might break the budget of many jurisdictions.²¹⁸ Sequestration also generally results in a longer jury selection process, as many potential jurors will attempt to get excused from jury service because they either cannot or prefer not to be away from their families and friends for an extended amount of time.²¹⁹ For the most part, jurors view

213. See King, *supra* note 32, at 2713 ("Eventually, the sluggish pace of trials prompted courts to abandon their first line of defense against jury misconduct: sequestration."); see also Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 71–72 (1996).

214. Fallon, *supra* note 31, at 966; see also Artigliere, *supra* note 177, at 643 (quoting a Florida judge as saying, "I have two ways I can do this. I can lock you up—that's called sequestering, it's a fancy word for locking you up—during the course of the trial, or I can have you promise me that you will strictly abide by my instructions during the trial . . .").

215. See Jury Survey, *supra* note 36 ("Sequestration [is] very burdensome on jurors . . . [and] very expensive for taxpayers.").

216. See, e.g., Rob Shaw, *Costs of Casey Anthony Case Not Just Measured in Dollars*, TAMPA BAY ONLINE (July 17, 2011), <http://www2.tbo.com/news/breaking-news/2011/jul/17/13/costs-of-casey-anthony-case-not-just-measured-in-d-ar-244247> ("It cost more than \$30,000 just to feed the Pinellas County jury for six weeks. . . . The tab was more than \$112,000 to put the jurors up at a nice hotel.").

217. See, e.g., Joe Guillen, *Cuyahoga Cuts Jurors' Daily Pay*, PLAIN DEALER, May 14, 2009, at B2 (discussing decisions in several Ohio counties to reduce juror pay in order to help balance county budgets).

218. See, e.g., Bob Egelko, *Budget Woes Slow the Wheels of Justice; Crisis Could Lead to 200 Layoffs, Close 25 S.F. Courts*, S.F. CHRON., July 19, 2011, at A1 (illustrating that a San Francisco budget crisis will result in the city laying off forty percent of its Superior Court employees).

219. King, *supra* note 32, at 2713 ("Judges concerned about jury competence recognized that sequestration deterred many potential 'reliable' jurors from serving as jurors."); Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 2D 191, 195–96 (1999).

sequestration negatively because they must live in a controlled environment away from their residences and those with whom they normally associate.²²⁰

One twist to the old idea of sequestration is “virtual sequestration.”²²¹ Here, jurors remain in their own homes but consent to having their access to the Internet and certain electronic devices either monitored or blocked.²²² While arguably less burdensome and probably less expensive than regular sequestration, virtual sequestration may be viewed by some as online snooping and overly intrusive.²²³ However, as discussed next, some attorneys currently conduct an informal version of virtual sequestration by investigating and monitoring the online activities of jurors.

B. Investigating Jurors

Besides imposing penalties, investigating jurors also works to limit improper juror research and communications. These investigations are carried out primarily by attorneys or their staff and occur via the Internet.²²⁴ Most people have at least one online reference or “footprint,” whether put there personally or by someone else.²²⁵ Attorneys investigate

220. See Strauss, *supra* note 213, at 106–07.

221. This idea was recently raised at a conference. See Professor Eric Chaffee, Address at the Legal Scholarship Conference at the University of Toledo College of Law (June 2010). This author is unaware of any jurisdiction that has implemented virtual sequestration. However, at least one enterprising district attorney in Texas is considering offering jurors free access to the court’s wireless network in exchange for temporarily “friending” his office, which, depending on privacy settings, would allow the DA to monitor the juror’s Facebook account. See Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J., Feb. 22, 2011, at A2; see also Jack Zemlicka, *Judges in Wisconsin Set Electronic Media Limits for Juries*, WIS. L.J., May 10, 2010 (citing a circuit judge as suggesting that judges “could ask jurors engaged in social networking that, if empanelled, would they consent to being friended by the court”).

222. Address by Eric Chaffee, *supra* note 221.

223. Julie Kay, *Social Networking Sites Help Vet Jurors*, LAW TECH. NEWS (Aug. 13, 2008), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315> (paid subscription).

224. See Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 211 (2001).

225. Allison, *supra* note 97 (“Everybody has something on them on the Web, and everybody can look it up.”) (quoting attorney Daniel Ross).

jurors²²⁶ by searching the jurors' digital trails²²⁷ or Internet footprints.²²⁸ This practice, which occurs before, during, and after trials, can take various forms.²²⁹ The most basic level is a name search on an Internet search engine.²³⁰ However, many attorneys employ far more sophisticated procedures such as extracting information from social networking sites and databases²³¹ and monitoring the online activities of jurors.²³²

Recently, online investigation of jurors has gained increased acceptance among practitioners.²³³ Moreover, courts and state bar associations have both approved²³⁴ and encouraged the practice.²³⁵ Proponents argue that the online investigation of jurors by attorneys has uncovered numerous instances of juror misconduct.²³⁶ Furthermore, proponents claim that once jurors realize that many of their voir dire answers can be verified, they either will be more truthful or will request dismissal from the case.²³⁷ Finally, jurors who

226. For a discussion of judges investigating jurors, see John DiMotto, *Judges and the Internet—Juror Information*, BENCH & B. EXPERIENCES (Apr. 28, 2010), <http://johndimotto.blogspot.com/2010/04/judges-and-internet-juror-information.html> (the blog of a Milwaukee County Circuit Court Judge).

227. Hoffmeister, *supra* note 40, at 32; cf. Tresa Baldas, *Open Web, Insert Foot*, NAT'L L.J. (May 10, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457874016&slreturn=1> (discussing lawyers "talking trash about clients—online, leaving a digital trail for bar counsel to follow").

228. Jeffrey T. Frederick, *Seasoned Jury Expert Shares Secrets of Voir Dire and Jury Selection*, YOURABA (Mar. 2011), <http://www.americanbar.org/publications/youraba/201103article01.html>; see also Kay, *supra* note 223.

229. See Zemlicka, *supra* note 221 ("Since the explosion of social networking, [a Wisconsin attorney] regularly researches jurors and monitors their online activity during lengthy trials. 'It's not unusual for someone in my office to run the name of a juror, if we get them ahead of time, through Google, Twitter or Facebook,' he said.") (internal quotation marks added).

230. Hoffmeister, *supra* note 40.

231. *Id.*

232. *Id.*; see also Kay, *supra* note 223.

233. Hoffmeister, *supra* note 40.

234. See, e.g., *Carino v. Muenzen*, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *26–27 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (admonishing a trial judge for forbidding counsel from investigating jurors online during jury selection); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2011) [hereinafter N.Y. Ethics Opinion] ("It is proper and ethical . . . for a lawyer to undertake a pretrial search of a prospective juror's social networking site.").

235. See, e.g., *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010) (encouraging attorneys to prevent retrials by investigating jurors' litigation history prior to empanelling the jury).

236. Hoffmeister, *supra* note 40.

237. Molly McDonough, *Rogue Jurors*, A.B.A. J., Oct. 2006, at 39, 43 ("Because judges are emphasizing [criminal background] checks [for jurors] . . . more jurors drop out before the jury is formally seated and thus 'fewer and fewer people are

know that their online activities will be investigated are more likely to follow court instructions throughout the trial.²³⁸

While online investigation of jurors will help reduce incidents of juror misconduct associated with the Digital Age, the practice has its limitations. First, as with imposing penalties, investigating jurors does not address the reasons that jurors violate court rules.²³⁹ Therefore, it does little to combat the root causes of juror misconduct. Second, unless courts impose virtual sequestration²⁴⁰ by requiring jurors to make all of their online activities and communications subject to review, certain misconduct will go undetected.

Third, and most problematic, looking for information about jurors online raises privacy issues. According to Judge Richard Posner, “Most people dread jury duty—partly because of privacy concerns.”²⁴¹ The following quotation reflects the view held by many on this issue: “The Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for privacy.”²⁴² Thus, as more citizens realize that jury duty now includes online background checks and monitoring, it is likely that the low juror summons response rates in certain parts of the country will only get worse.²⁴³

Finally, there is a concern that attorneys will not reveal juror misconduct that they discover to the court or opposing counsel, especially if they think that a particular juror is advantageous to their side or if they agree with the overall outcome of the trial.²⁴⁴ At present, few courts require attorneys

coming up with a criminal record in contradiction of their jury questionnaire.’ ”) (quoting a district attorney).

238. Goldstein, *supra* note 192, at 603 (“With the knowledge that they are under the watchful eye of the court, jurors are less likely to discuss trials on their social networking sites.”).

239. See *supra* Parts I.A.1–2, I.B.2.

240. See *supra* notes 221–23 and accompanying text.

241. United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc) (citations omitted).

242. Kay, *supra* note 223 (quoting litigator Dan Small).

243. See Elaine Silvestrini, *Tampa Judge Threatens Jail for People Ignoring Jury Summons*, TAMPA BAY ONLINE (Oct. 3, 2011), <http://duke1.tbo.com/content/2011/oct/03/041120/judge-threatens-jail-for-residents-who-ignored-jur/news-breaking/>.

244. See John E. Nowak, *Jury Trials and First Amendment Values in “Cyber World,”* 34 U. RICH. L. REV. 1213, 1225 (2001) (“The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner.”).

to reveal information uncovered about jurors; most jurisdictions reflect the views of the Jury Survey respondents and consider such information to be attorney work product.²⁴⁵ Only a small number of states make information about jurors discoverable in criminal cases.²⁴⁶ The states that impose such a requirement, generally speaking, place the burden solely on the prosecution and only after a request from defense counsel.²⁴⁷ Furthermore, the duty to disclose, in many instances, is limited to private information as opposed to publicly available information.²⁴⁸ Thus, it is highly unlikely that any information pertaining to juror misconduct will be disclosed through the discovery process.

As for an attorney's ethical obligation to reveal such information, the Rules of Professional Responsibility have not kept pace with technological advancements brought by the Digital Age. The most relevant rule of professional responsibility with respect to juror misconduct is Rule 3.3, Comment 12, which states:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the

245. Jury Survey, *supra* note 36; *see also* Moskitis, *supra* note 141, at 630–33; Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R. 3d 571 (1978). For cases not requiring the release of juror information obtained by the prosecutor to defense counsel, *see*, for example, *Monathan v. State*, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984); *Martin v. State*, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979).

246. *See, e.g.*, *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981), *rev'd on other grounds sub nom.* *Murtishaw v. Woodford*, 255 F.3d 926 (9th Cir. 1999) (finding that judges may permit discovery of juror information obtained by opposing counsel); *State v. Bessenecker*, 404 N.W.2d 134, 138–39 (Iowa 1987) (holding that a juror “rap sheet” can be discoverable in certain circumstances); *Commonwealth v. Smith*, 215 N.E.2d 897, 901 (Mass. 1966) (finding that information about prospective jurors obtained by the police should be available to both parties).

247. *See, e.g.*, *Bessenecker*, 404 N.W.2d at 138–39 (limiting access to juror information obtained by county attorneys and requiring county attorneys to disclose to the defense any information obtained).

248. *See, e.g.*, *State v. Beckwith*, 344 So. 2d 360, 370 (La. 1977) (holding that the prosecution was not required to disclose a compilation of prospective jurors' voting records where there was no evidence that such information was unavailable to the defendant through independent means); *State v. Matthews*, 373 S.E.2d 587, 590–91 (S.C. 1988) (holding that the prosecution was not required to disclose results of investigation into potential jurors' backgrounds where defense counsel had an opportunity on voir dire to explore jurors' “backgrounds, attitudes, and characteristics”).

integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.²⁴⁹

In applying Rule 3.3, Comment 12, to the Facebook post of the Michigan juror discussed in Part I,²⁵⁰ neither the defense attorney nor the prosecution would have an ethical duty to present this information to the court. In that case, the defense attorney wanted to reveal the information discovered in the Facebook post because it was beneficial to her client to remove the juror.²⁵¹ But the juror's act was neither fraudulent nor criminal, although it was improper and sufficient to cause her removal.²⁵² As that example illustrates, the current legal system lacks adequate safeguards to ensure that all disqualifying juror information is brought forward.

C. *Allowing Questions*

Allowing jurors to ask questions of witnesses would significantly reduce the detrimental impact of the Digital Age on jury service.²⁵³ This is because juror questions, like jury instructions, address the reasons that jurors commit misconduct.²⁵⁴ When jurors have their questions answered,

249. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2007). At least two states—New York and Tennessee—have more expansive rules. *See* TENN. RULES OF PROF'L CONDUCT R. 3.3(i) (2011) ("A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal," confidentiality requirements notwithstanding.); N.Y. Ethics Opinion, *supra* note 234. In addition, one court has held that "[i]t is unquestioned that each party has an obligation to report the incompetency of any juror upon discovery." *Cowden v. Wash. Metro. Area Transit Auth.*, 423 A.2d 936, 938 (D.C. 1980). However, the *Cowden* decision has yet to be followed by any other court.

250. *See supra* notes 137–39 and accompanying text.

251. *See supra* notes 137–39 and accompanying text.

252. *See supra* notes 137–39 and accompanying text.

253. *See* Brickman et al., *supra* note 2, at 296 ("If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.").

254. *See supra* Part I.A.1. Consider also the case of *Commonwealth v. Cherry*, where the defendant faced capital murder charges for killing his girlfriend's infant child. After finding the defendant not guilty on the charge of first-degree murder, the jury retired for the day in order to consider involuntary manslaughter

they become less confused and curious and have greater confidence in their verdicts.²⁵⁵ Prohibiting questions leads jurors to seek alternative avenues for information.²⁵⁶

Admittedly, resolving issues like juror curiosity is no easy task.²⁵⁷ Many of the questions that arise from a juror's inquiring mind cannot be answered directly due to restrictions imposed by rules of evidence and the constitutional protections guaranteed to parties and witnesses. This does not mean, however, that these questions should be ignored.

For example, a juror might ask the court whether the defendant is presently incarcerated. It is unlikely that the judge would ever answer or pose such a highly prejudicial question. But the judge can use this situation to her advantage by turning it into a teaching point. The judge, even without going into the details of the question, can once again instruct the jury, including the juror who raised the question, that certain evidence must not be examined or considered by the jurors in order to protect the rights of the parties involved in the case.²⁵⁸ This timely re-education of the jury is important because answers to questions like the defendant's incarceration status²⁵⁹ are easily accessible online.²⁶⁰

and third-degree murder charges the next day. During the night, one juror researched the term "retinal detachment," which was a key issue with respect to the injuries sustained by the infant. The juror's online research resulted in the judge declaring a mistrial. Interestingly, this same juror wanted to ask questions during the trial, but the judge refused to allow questions. Sheena Delazio, *Mistrial Declared in Baby's Death*, TIMES LEADER (Jan. 15, 2011), http://www.timesleader.com/news/Mistrial_declared_in_baby_rsquo_s_death_01-14-2011.html.

255. See *supra* notes 66–103, 170–80 and accompanying text.

256. See *supra* notes 95–97 and accompanying text.

257. See Judge Dennis Sweeney (Retired), *Social Media and Jurors*, MD. B.J., Nov. 2010, at 44, 48 (arguing that, in addition to allowing jurors to ask questions, judges "should prompt counsel to consider answering the obvious questions presented instead of leaving them open").

258. Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 630 (stating that juror questioning would "pinpoint . . . areas of improper speculation and enable the trial judge to neutralize [its] effects by appropriate admonition") (quoting Bertram Edises, *One-Way Communications: Achilles' Heel of the Jury System*, 48 CAL. ST. B.J. 134, 137 (1973)).

259. See, e.g., *Persons in Custody*, MONTGOMERY COUNTY SHERIFF PHIL PLUMMER, <http://www.mont.miamivalleyjails.org> (last updated Sept. 17, 2011) (listing all inmates housed in the Montgomery County Jail in Ohio by name).

260. Brickman et al., *supra* note 2, at 291 ("With the advent of the Internet and the ease with which it can be accessed anytime, anywhere, concerns about exposure to pre-trial or mid-trial information obtained outside of the courtroom and about juror use of such information take on a whole new dimension.").

Besides reducing curiosity, allowing questions aids jurors in understanding the trial. Questions by jurors signal to the court and the attorneys what areas or topics are unclear and need further clarification.²⁶¹ This in turn reduces the need for jurors to speculate, conduct research, or contact outside third parties for information.²⁶²

Finally, by asking questions, jurors become more confident in their verdicts.²⁶³ This is attributable to a variety of factors. First, jurors who ask questions are generally less passive and more attentive during trial.²⁶⁴ Second, questions and their answers decrease both speculation in the deliberation room and uncertainty about the verdict.²⁶⁵

While some jurisdictions still do not allow jurors to pose questions, many are increasingly allowing them in both civil and criminal trials.²⁶⁶ This is not to say, however, that questions by jurors are routine. Most jurisdictions that allow jurors to submit written questions do so at the discretion of the judge, who also decides whether those questions will be posed to the witnesses.²⁶⁷ Thus, in some courts, jurors are not only kept in the dark about questions but also discouraged or

261. See Kim Smith, *AZ Jurors Are Given Bigger Say in Trials*, ARIZ. DAILY STAR (Feb. 28, 2011, 12:00 AM), http://azstarnet.com/news/local/article_c3c684dc-f816-512e-b4cb-a5814300f65e.html.

262. See Brickman et al., *supra* note 2, at 298 (“The more they understand what they hear in court, the less motivated they may be to do Internet research for clarification.”).

263. See Judge John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541, 543 (2004). See generally Steven Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL’Y & L. 259 (1997).

264. B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, CT. REV., Spring 2004, at 12, 15.

265. *Id.* (citing various studies discussing the positive attributes of allowing juror questions). “The overwhelming majority of jurors felt that being allowed to put their questions to witnesses improved their role as decision makers When asked how the question procedure helped, almost 75% of jurors answered that the procedure helped them better understand the evidence.” *Id.*

266. See Nancy S. Marder, *Answering Jurors’ Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747 (2010); see also Martin A. Schwartz, *Selected Evidence Issues Illustrated—Recent Decisions, Famous Trials, Movies and Novels*, 855 PRACTISING L. INST. 19, 147–52 (2011); Colleen Jenkins, *Change Lets Jurors Submit Questions for Trial Witnesses*, ST. PETERSBURG TIMES (Jan. 4, 2008), http://www.sptimes.com/2008/01/04/State/Change_lets_jurors_su.shtml (“The tweaks in the state’s jury system follow a nationwide trend toward fuller participation by the citizen deciders of fact.”).

267. See *State v. Fisher*, 789 N.E.2d 222, 226–28 (Ohio 2003) (reviewing court holdings on juror questioning in various jurisdictions).

prevented from asking them.²⁶⁸ This is unfortunate because jurors who are permitted to ask questions “feel more involved in the trial” and report an enhanced satisfaction with their jury service.²⁶⁹

Contrary to the growing national trend of allowing questions by jurors, few Jury Survey respondents recommended this practice for combating improper juror research and communications.²⁷⁰ In fact, few Jury Survey respondents thought this specific reform proposal would decrease or prevent juror misconduct. Some Jury Survey respondents went so far as to question the connection between juror questions and misconduct.²⁷¹ Others thought that questions by jurors would cause the judge to lose control of the courtroom. For example, one Jury Survey respondent wrote that she was “[n]ot certain [that allowing juror questions] would help—a judge couldn’t be certain where this would lead.”²⁷² This response indicates a lack of familiarity with how jurors ask questions in court.

In the courts that allow juror questions, the normal procedure is as follows: At the conclusion of a witness’s testimony, the judge asks the jurors whether they have any questions.²⁷³ If the jurors do have questions, they write them down and then hand them to the bailiff, who gives the questions to the judge.²⁷⁴ The judge and the attorneys review the questions.²⁷⁵ The judge, after hearing any possible objections from the attorneys, then decides whether she will answer or pose the question to the witness.²⁷⁶ Thus, the concern about “where this would lead” appears to be unwarranted. Judges remain in control because they still serve as gatekeepers, monitoring how questions are handled and what information the jurors will receive. Judges lose control

268. Marder, *supra* note 266, at 747.

269. Dann & Hans, *supra* note 264, at 15.

270. Only six of forty-one Jury Survey respondents recommended allowing jurors to ask questions. Jury Survey, *supra* note 36.

271. *Id.*

272. *Id.*

273. Barry A. Cappello & James G. Strenio, *Juror Questioning: The Verdict Is In*, TRIAL, June 2000, at 44, 48.

274. *Id.*

275. *Id.*

276. *Id.*

when jurors, after growing frustrated with the inability to ask questions, seek answers outside of the courtroom.²⁷⁷

The views expressed by the Jury Survey respondents regarding juror questions may be attributed to the fact that they dislike the idea of allowing anyone else in the courtroom to ask questions.²⁷⁸ At present, only the judge and attorneys have the power to ask questions. By sharing this right with someone else, the judges and attorneys who participated in the Jury Survey might feel that they have lost some power or that jurors are now equal partners in the trial process.²⁷⁹ Also, the Jury Survey respondents may share some of the concerns raised by the Sixth Circuit Court of Appeals when it addressed the issue of jurors asking questions in *United States v. Collins*:

There are a number of dangers inherent in allowing juror questions: jurors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies.²⁸⁰

The potential problems raised by the Sixth Circuit and Jury Survey respondents regarding juror questions must be examined in the context of what now occurs when jurors are not allowed to pose questions. Jurors go elsewhere and seek answers through alternative means. According to Professor Nancy Marder, jurors who are not afforded the opportunity to ask questions during trial are more likely to engage in self-

277. Macpherson & Bonora, *supra* note 176, at 43 ("However, allowing and even encouraging jurors to ask their questions in the courtroom is the best way to maintain control over the evidence they consider, as it will reduce—if not eliminate—the jurors' motivation to get their questions answered online.").

278. See Cappello & Strenio, *supra* note 273, at 48–49 ("Simply put, if a trial judge sitting as a trier of fact without a jury can ask questions, jurors should have the same right in the careful search for the truth.").

279. See Smith, *supra* note 75, at 559 ("The fact that [juror questioning] is not more widely employed may be due to a basic distrust of juries on the part of judges and their fear that they will lose control of the trial process.").

280. *United States v. Collins*, 226 F.3d 457, 461 (6th Cir. 2000).

help.²⁸¹ And, unlike in the past, self-help in the Digital Age is easier for jurors to accomplish and more difficult for courts to discover.²⁸² By denying jurors even the opportunity to seek answers to their questions in the presence of the judge, the court encourages them to look elsewhere and rely on alternative sources.²⁸³

D. Improving Instructions

The most obvious and popular solution for combating the negative influence of the Digital Age is to modernize jury instructions.²⁸⁴ This proposal received the greatest amount of support from the Jury Survey respondents.²⁸⁵ In addition, several courts have recently recommended improving instructions to jurors.²⁸⁶ Thus, the majority of Part II will be spent on this topic.

The problem with relying on jury instructions is that they are only instructions—nothing more.²⁸⁷ In order for instructions to be effective, jurors must follow them. In the corruption trial of Mayor Sheila Dixon, the jurors, despite repeated admonitions by the judge to desist, continued to communicate via Facebook.²⁸⁸ Absent sequestering jurors and

281. MARDER, *supra* note 125, at 113 (“There are instances in which jurors have, on their own, made site visits or consulted reference books, the Internet, and lawyers who are not involved in the case.”) (footnote omitted).

282. *See supra* Part I.A.2.

283. *See generally* Macpherson & Bonora, *supra* note 176.

284. *See* King, *supra* note 32, at 2728. As Professor King notes, this interest in more specific jury instructions is not new: “Calls for more explicit instructions to jurors to keep out of mischief appeared as early as 1893 . . .” *Id.*

285. Twenty-six of forty-one Jury Survey Respondents cited jury instructions as an effective method of decreasing online research and improper communications by jurors. Jury Survey, *supra* note 36.

286. *See, e.g.*, United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011); State v. Mitchell, 252 P.3d 586, 591 (Kan. Ct. App. 2011) (“We encourage our PIK committee to consider a revision to the general instruction on juror communication along the lines of that utilized in New York.”); Superior Court of N.J., *supra* note 197 (“To avoid any similar instances from happening again, the court recommends the model instructions to the attention of The Supreme Court Committee on Model Criminal Jury Charges for a possible revision, which should make unquestionably clear the prohibition on juror research and outside materials is absolute.”).

287. People v. Jamison, No. 8042/06, 2009 WL 2568740, at *6 (N.Y. Sup. Ct. Aug. 18, 2009) (“No matter what the instructions may be, they are only as effective as the integrity of the juror who hears them.”).

288. *Dixon Jurors Ignore Judge, Continue Facebook Posts*, *supra* note 129. In another example, a federal judge warned jurors in a death-penalty trial forty-one

confiscating all of their communication devices, which is both burdensome and expensive, no surefire methods exist to ensure compliance.²⁸⁹ Thus, jury instructions must be written in such a manner as to create the optimum atmosphere for acceptance.

1. Component Parts

One way to increase the likelihood of adherence is to use language easily understood by jurors.²⁹⁰ This includes avoiding overly technical terms and offering descriptions of improper conduct.²⁹¹ Some jurors violate the rules against conducting improper research because the instructions in place either are unclear or do not specifically address the technological advancements ushered in by the Digital Age.²⁹² For instance, although jurors are told in their initial summons not to “gather any evidence” about the case, some nevertheless look up the name of a party on the Internet.²⁹³ To those jurors, “gathering evidence” may mean going to the library or the actual crime scene, not necessarily performing a name or image search on Google.²⁹⁴ This has caused some judges to “go beyond the current boilerplate instructions to jurors and specifically include references to the Internet and social media.”²⁹⁵

times not to discuss the trial with outside third parties, yet the jury foreperson still contacted the press about the case prior to the end of the trial. *See* United States v. Basham, 561 F.3d 302, 316–21 (4th Cir. 2009); Mark Sherman, *Kagan: No Need for Court Review of Rogue Juror*, WASH. TIMES (May 31, 2010), <http://www.washingtontimes.com/news/2010/may/31/kagan-no-need-court-review-rogue-juror>.

289. *See supra* Part II.A.3.

290. *Russo v. Takata Corp.*, 774 N.W.2d 441, 450 n.* (S.D. 2009) (“We suggest circuit courts consider using simpler and more direct language in the [jury] summons to indicate that no *information* about the case or the parties should be sought out by any means, including via computer searches. This type of admonishment is warranted given the ease with which anyone can obtain information via the internet . . .”).

291. *See Zemlicka, supra* note 221 (“Judges admit there is little they can do to completely keep jurors from avoiding electronic communication, which is why many stress the potential problems that even inane interaction can create.”).

292. *See id.* (“I think people know they can’t go home and talk to their wife about a case, but they don’t think anything about firing off a bunch of texts That is why you have to state it explicitly.”) (quoting a judge).

293. *See, e.g., Russo*, 774 N.W.2d at 452.

294. *See id.*; *see also* Sweeney, *supra* note 202, at 3 (“[A] deliberating juror conducted an on-line search for the terms ‘livor mortis’ and ‘algor mortis’ on Wikipedia When asked about it, the juror said, ‘To me that wasn’t research. It was a definition.’”).

295. *Browning, supra* note 98.

Similar issues arise with instructions about improper juror communications.²⁹⁶ According to one legal commentator, “People tend to forget that e-mail, twittering, updating your status on Facebook is also speech There’s an impersonality about it because it’s a one-way communication—but it is a communication.”²⁹⁷ Therefore, for jury instructions to be effective, they have to reflect the new methods by which members of society communicate and interact.

In addition to being told what they cannot do, jurors need to know why it is impermissible.²⁹⁸ Several Jury Survey respondents echoed this belief, with one respondent stating that jury instructions are “effective, if . . . the reason for the rule is explained.”²⁹⁹ Providing the “why” is important because jurors in the Digital Age are more receptive to learning information online.³⁰⁰ Moreover, many jurors today feel comfortable using technology to discover facts for themselves or communicate with others.³⁰¹ As a result, it is a challenge to get these jurors to give up their methods of learning and acquiring

296. See Jason Cato, *Burgeoning Social Networking System Has Legal Community in a Twitter*, PITTSBURGH TRIB.-REV. (Feb. 8, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/print_666211.html.

297. Greg Moran, *Revised Jury Instructions: Do Not Use the Internet*, SIGN ON SAN DIEGO (Sept. 13, 2009, 2:00 AM), <http://www.signonsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet> (quoting professor Julie Cromer Young); see also Trish Renaud, *Watch out for Blogging Jurors*, LAW TECH. NEWS (Feb. 17, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202428284825> (paid subscription) (quoting a juror posting on his blog, “Hey guys! I know jurors aren’t supposed to talk about their trial, but nobody said they couldn’t LIVE-BLOG it, right?”).

298. Diane Jennings, *Dallas Judges Take Pains to Keep Web from Undermining Fair Trials*, DALL. MORNING NEWS (Jan. 30, 2010), <http://www.dallasnews.com/news/community-news/dallas/headlines/20100130-Dallas-judges-take-pains-to-keep-8754.ece> (“Courts have to explain to people why, not just tell people, ‘Don’t read the newspaper, don’t do your own research and don’t Twitter’ Explain the rationale behind it.”) (quoting an attorney); see also Macpherson & Bonora, *supra* note 176, at 42 (“To get through to jurors who can’t quite believe that the judge really means *no* communication and *no* research, the judicial admonition needs to do more than ‘just say no.’ Social science research on persuasion has demonstrated that compliance can be measurably increased by simply adding the word ‘because’ and some type of explanation.”).

299. Jury Survey, *supra* note 36.

300. See Christopher Hope, *Web-Savvy Young Make Bad Jurors Because They Cannot Listen*, Says Lord Chief Justice, TELEGRAPH (Nov. 6, 2008, 7:33 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/3393061/Web-savvy-young-make-bad-jurors-because-they-cannot-listen-says-Lord-Chief-Justice.html>.

301. *Id.*

information and adhere to the court's instructions.³⁰² According to two well-known trial consultants, "The deeply ingrained habit of . . . resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted with a truly important decision."³⁰³ To make the court's task easier, jurors need to be told why practices that they regularly rely on are incompatible with jury service.³⁰⁴

While a long discourse on due process is unnecessary, jurors need to know that information obtained outside of the courtroom cannot be considered when deciding a verdict despite how inconsequential or helpful the information may seem.³⁰⁵ Jurors should be told that, to ensure fairness in the trial process, the parties must have the opportunity to refute, explain, or correct the information jurors receive.³⁰⁶ According to Ohio Supreme Court Justice Judith Ann Lanzinger:

One of the things we as judges need to do is explain why [the rules of evidence are] so important We're not trying to keep the truth from anyone—pull the wool over anyone's eyes. The rules of evidence are there for a reason to make sure both sides get a fair trial.³⁰⁷

Failure to provide an explanation of the court's instructions not only decreases the likelihood of juror compliance but also creates mistrust of the judicial system.³⁰⁸

In addition to providing the rationale behind the instructions, judges must advise jurors of the negative

302. See Macpherson & Bonora, *supra* note 176, at 42 ("Many jurors under 40 are used to keeping their electronic devices close at hand and ignoring any authority figure who attempts to impose prohibitions on their access to the Internet.").

303. *Id.*

304. According to one Jury Survey Respondent, jury instructions can be effective if "given forcefully but fairly and [if] the reason for the rule is explained." Jury Survey, *supra* note 36.

305. See Brickman et al., *supra* note 2, at 297 ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors *why* their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system.").

306. See *supra* Part I.A.

307. Jacob Lammers, *Courts Adapting to Technology*, NEWS-HERALD (June 13, 2010), <http://www.news-herald.com/articles/2010/06/13/news/nh2621582.txt>.

308. See Gareth S. Lacy, *Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research*, 1 REYNOLDS CTS. & MEDIA L.J. 167, 178 (2011).

consequences of ignoring them.³⁰⁹ This starts by reminding jurors that disregarding the court's instructions is a violation of their oath.³¹⁰ Next, jurors should be told that failure to abide by these rules may cause the court to declare a mistrial, which is costly both in financial terms and in the emotional toll it takes on those involved in the process.³¹¹ Also, jurors need to be informed of the potential for contempt of court and the subsequent penalties assessed to jurors who violate the court's instructions.³¹²

Adding a self-policing section will also encourage compliance with jury instructions.³¹³ While some jurisdictions have shied away from this approach for fear of creating distrust and apprehension among jurors,³¹⁴ jury instructions should include language requiring jurors to report fellow jurors for failing to follow the rules of the court.³¹⁵ This watch-dog

309. Artigliere et al., *supra* note 38, at 14 ("Some judges tell jurors *why* it is important to follow the instructions. Many jurors respond better to direction if they understand the reason the requirement has been placed on them.").

310. The value of the oath was recently illustrated in the first trial of former Illinois Governor Rod Blagojevich. *Holdout Juror in Blagojevich Case Explains Her Reasoning*, STLtoday.COM (Aug. 28, 2010, 12:00 AM), http://www.stltoday.com/news/national/article_f803c33c-18ef-5244-be18-7235b1fc26a5.html ("[S]tanding her ground in the jury room was not easy. Other jurors have acknowledged pressuring [the holdout] to change her vote on the Senate seat. . . . One person asked the judge for a copy of the juror's oath, implying that [the holdout] wasn't fulfilling her obligation.").

311. Judge Margaret R. Hinkle, *Criminal Practice in Suffolk Superior Court*, BOS. B.J., Nov.–Dec. 2007, at 6, 6 ("With a jury impasse, not only do jurors feel a sense of incompleteness, but any mistrial imposes an enormous emotional and financial cost on the prosecution, the defense, the victim and the Commonwealth.").

312. See Fallon, *supra* note 31, at 967.

313. See Artigliere et al., *supra* note 38, at 14 ("Another tactic is to 'empower' all jurors to report transgression by informing them of their duty to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial."); see also Edward T. Swaine, Note, *Pre-deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 201 (1988).

314. Michigan proposed a rule on electronic device usage by jurors that contained a requirement for jurors to report other jurors who violate the court's instructions. Correy Stephenson, *Michigan Considers Rule on Juror Device Use*, ALLBUSINESS (May 12, 2009), <http://www.allbusiness.com/legal/evidence-witnesses/12333409-1.html> (paid subscription). This requirement was later removed. See *Order: Amendment of Rule 2.511 of the Michigan Court Rules*, MICH. SUPREME CT. (June 30, 2009), <http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf>.

315. Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 97 (2010) ("Courts should conclude their preliminary instructions by

requirement is necessary because juror misconduct is difficult to detect and prevent.³¹⁶ An added benefit of this rule is that if a juror violates the court's instructions, for example by researching the case or communicating with a third party, she, for fear of being reported to the court, is less likely to reveal her findings to other jurors and thereby taint the entire jury.³¹⁷

Besides the actual substance of the jury instructions, there are procedural questions such as when they should be given and how often.³¹⁸ As indicated in Part I, improper research and communications by jurors occur at all stages of the trial, including immediately upon receiving a jury summons.³¹⁹ Thus, the earlier the instructions are given to jurors—for example, in the jury summons or upon initial arrival at the courthouse—the greater the chance for compliance. As for frequency, several Jury Survey respondents stated that instructions should be repeated as often as possible³²⁰ because they are easily forgotten.³²¹ This repetition usually comes in the form of brief reminders during breaks in trial.³²² Legal commentators have also recommended that jurors be provided with the instructions prior to starting deliberations.³²³

Another procedural recommendation involves having jurors sign an oath or affidavit acknowledging the instructions.³²⁴ The Jury Survey respondents were split on the benefits of this proposal. One felt that, “[i]f jurors commit to signing [a] declaration, they are more likely to not violate that commitment.”³²⁵ Another stated that “actually sign[ing] a

telling the jurors that they have a responsibility to inform the court of any misconduct that they witness.”).

316. Strutin, *supra* note 52 (“The hallowed ground of jury deliberations makes it difficult to unearth, preserve and authenticate surreptitious electronic communications and Web postings or to seek redress when they are uncovered.”).

317. Brickman et. al., *supra* note 2, at 298.

318. Artigliere et al., *supra* note 38, at 14.

319. See, e.g., Russo v. Takata Corp., 774 N.W.2d 441, 444 (S.D. 2009).

320. Jury Survey, *supra* note 36 (“Because it is repetitive and comes from the judge I believe this is effective.”).

321. One Jury Survey respondent stated, “This is o.k. but would be forgotten during the time delay from summons and jury duty. Moreover, it is more effective when the jurors hear it from the judge.” *Id.*; see also Bell, *supra* note 315, at 91 (“Perhaps in part because Internet activity is such an integral, reflexive part of many Americans’ lives, some judges not only give . . . instructions [not to use the Internet] at the inception of trial, but also repeat them before each recess.”).

322. Artigliere et al., *supra* note 38, at 14.

323. JURORS: THE POWER OF 12, *supra* note 118, at 8–9.

324. See Moran, *supra* note 297.

325. Jury Survey, *supra* note 36.

document may verify to them the importance.”³²⁶ Another opposed such a policy, stating that “[w]e can’t turn jury duty into a check list of things sworn to.”³²⁷ And yet another respondent believed that this step is unnecessary if the judge addresses the issue early in voir dire.³²⁸

At present, this Article does not favor requiring jurors to sign an affidavit or contract stating that they will abide by the jury instructions. Obtaining the juror’s signature would probably heighten juror awareness about the importance of following instructions; however, it seems overly formalistic. Jurors should not have to enter into written agreements with the court to fulfill their civic responsibilities. Furthermore, it may not be necessary if the other suggestions recommended in this Article are implemented. Moreover, taking such action may lead jurors to falsely believe that these instructions are superior or more important than all other instructions given to them by the court.

Finally, certain jurors are going to ignore the court’s instructions regardless of how well they are written and delivered.³²⁹ For example, some jurors feel compelled to chronicle every aspect of their life online or learn the entire story about the case prior to rendering a verdict.³³⁰ To help deal with these so-called rogue jurors, attorneys or preferably the judge should ask all jurors during voir dire about their online presence and their ability to limit their use of the Internet during the trial.³³¹ On occasion, straightforward and direct questions are quite revealing, as some potential jurors make their inability to follow court rules quite clear.³³²

326. *Id.*

327. *Id.*

328. *See id.*

329. Strutin, *supra* note 52 (“Sharing the minutest details of our lives through mobile telecommunications has become second nature in the Information Age.”).

330. *See supra* Part I.A.2.

331. *See* Judge Linda F. Giles, *Does Justice Go Off Track When Jurors Go Online?*, BOS. B.J., Spring 2011, at 7, 8–9 (“At the risk of sounding like a Luddite, it seems to me that succumbing to the temptation of technology and allowing jurors to go rogue is not the solution.”); Allison, *supra* note 97 (“I find that judges are asking now during voir dire whether jurors have a blog and what the name of the blog is If you get that commitment from the juror upfront, you’re more likely to avoid problems down the line.”) (quoting a trial consultant).

332. Ross, *supra* note 27. Ross cites the following example:

In Kansas City, attorney Peter Carter asked potential jurors during voir dire if they would follow instructions not to do Internet research. In response, about six to 10 said that they would not. Carter also

In addition to weeding out jurors who refuse to follow the judge's instructions, these questions help educate jurors and give them early notice about court prohibitions. They let the juror know that some habits such as blogging or looking up information on the Internet that are viewed as normal and inconsequential during everyday life can have profound and harmful consequences when conducted during jury duty. Also, early questioning alerts the court and attorneys to those jurors who might regularly blog or visit social media websites. This in turn facilitates online monitoring of juror activity.³³³

Numerous jurisdictions have updated or are in the process of updating their jury instructions to address the new methods by which jurors communicate and research.³³⁴ Many of the updates include the suggestions mentioned above. This Article will now examine two sample jury instructions—one from Multnomah County, Oregon³³⁵ and the other from the Judicial Conference Committee on Court Administration and Case Management (Judicial Conference Committee) of the federal courts—to see how well these instructions adhere to the previously discussed recommendations.

2. Sample Instructions

a. *Multnomah County, Oregon*

Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, tweeting, blogging or

discovered, simply by asking, that some six or seven of the 80 potential jurors already had researched the case on the Internet.

Id.

333. See *supra* Part II.B.

334. Even the military is getting into the act. See Kent Harris, *Jury Instructions to Include Rules on Use of New Media*, STARS & STRIPES (June 21, 2009), <http://www.stripes.com/news/jury-instructions-to-include-rules-on-use-of-new-media-1.92649> (noting that, following cases of juror misconduct, a military judge "said he's been working on specific language addressing networking phenomena such as Twitter and Facebook that judges would use when instructing troops who sit on court-martial panels"). For a comprehensive overview of the various instructions across the country, see Robinson, *supra* note 203.

335. Of the jury instructions surveyed at the time this Article was written, Multnomah County, Oregon, along with New York, appeared to have the most comprehensive instructions addressing juror research and communications in the Digital Age.

any other form of communication. Do not discuss this case with other jurors until you begin your deliberations at the end of the case. Do not attempt to decide the case until you begin your deliberations.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I do not think you are paying attention, but because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common[:] what they just watched together.

There are at least two reasons for this rule. The first is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won't have that until the very end of the trial. The second reason for the rule is that we want all of you working together on this decision when you deliberate. If you have conversations in groups of two or three during the trial, you won't remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial.

Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to my staff.

Do not make any independent personal investigations into any facts or locations connected with this case. *Do not* look up any information from any source, including the Internet. *Do not* communicate any private or special knowledge about any of the facts of this case to your fellow jurors. *Do not* read or listen to any news reports about this case or about anyone involved in this case.

In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our

system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.³³⁶

b. Judicial Conference Committee

Before Trial

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

336. *Jury Instructions*, MULTNOMAH COUNTY, OR. (2009), available at <http://bit.ly/cb3y3a> [hereinafter *Multnomah County Jury Instructions*].

At the Close of the Case

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.³³⁷

c. Analysis

Both instructions avoid overly complex language and appear to be drafted with the layperson in mind. For example, they do not use technical terms or legal homonyms.³³⁸ A juror would not need any legal training to understand these instructions. In addition, each instruction specifically references the prohibition against using both old and new forms of communication to discuss the case.

Also, each instruction offers specific examples of inappropriate conduct. Surprisingly, many jurors are still

337. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009) [hereinafter JUDICIAL CONFERENCE COMM. INSTRUCTIONS], available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>. These instructions have been endorsed by the Third Circuit Court of Appeals. *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) (“We enthusiastically endorse these instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions.”).

338. See Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1101–02 (2001) (“One of the most obvious problems with jury instructions, or any other legal language that is meant to be understood by the general public, is *technical vocabulary*. Some legal terms are completely unknown in ordinary language, like *quash* or *expunge* or *res gestae*. Others, which I have elsewhere called *legal homonyms*, are ordinary words but have a specific legal meaning. Examples include *brief*, *burglary*, *mayhem*, *complaint*, *notice*, *aggravation*, and many others. Legal homonyms are potentially dangerous because a layperson may think that he knows what they mean, whereas the terms may mean something quite different in the law.”) (footnote omitted).

unsure of what activities run afoul of court rules.³³⁹ Examples help connect the instructions to everyday juror behavior. Some judges even go beyond the standard instructions and take it upon themselves to demonstrate how seemingly innocent online communications can jeopardize a trial.³⁴⁰ This is important because jurors need to understand that routine practices such as “Googling” individuals or discussing their lives on social media websites, which they have grown accustomed to and reliant on, have to be modified during jury duty.

Of the two instructions, the Multnomah County instructions are superior to those of the Judicial Conference Committee. First, while both tell jurors not to research the case or discuss it until deliberations, the Multnomah County instructions explain, at least partially, why this rule is necessary. Jurors in the Digital Age, more so than in the past, need this explanation. Telling jurors why they should not engage in misconduct, even if only in broad terms, is important because it increases the likelihood that jurors will “buy in” and follow the instructions.³⁴¹ While the Multnomah County instructions do a good job explaining why improper communications are deleterious, they do not go far enough with respect to research.³⁴² Some states, such as Wisconsin, inform jurors that relying on outside information or conducting research “is unfair because the parties would not have the opportunity to refute, explain, or correct it.”³⁴³

339. Many jurors who are discovered conducting research claim that they did not know that they were doing anything wrong. In one Florida case, after the judge declared a mistrial because a juror went to Wikipedia to look up the terms “sexual assault” and “rape trauma syndrome,” the juror said, “I didn’t read about the case in the newspaper or watch anything on TV. . . . To me, I was just looking up a phrase.” Susannah Bryan, *Davie Police Officer Convicted of Rape to Get New Trial*, PALM BEACH POST (Dec. 16, 2010), <http://www.palmbeachpost.com/news/crime/davie-police-officer-convicted-of-rape-to-get-1126441.html>; see also Zemlicka, *supra* note 221 (“But the situation served as a cautionary tale as to how even seemingly harmless online banter can potentially influence jurors and their verdict.”).

340. See Artigliere et al., *supra* note 38, at 14 (“Some judges are already enhancing the standard instructions on their own.”).

341. See *supra* notes 298–304 and accompanying text.

342. See *Multnomah County Jury Instructions*, *supra* note 336.

343. *Social Networking, Jurors and Jury Instructions*, WIS. LAW. (Feb. 2011), http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=100316 (quoting Wisconsin Jury Instructions).

Also, the Multnomah County instructions, unlike those of the Judicial Conference Committee, define terms like “discussion” and how such terms are interpreted in the Digital Age. For example, the Multnomah County instructions explain to jurors that “discussion” includes “emailing, text messaging, tweeting, blogging or any other form of communication.”³⁴⁴ This is important because many jurors think that “discussion” only concerns face-to-face conversations.³⁴⁵

As for repetition, the Multnomah County instructions inform jurors that the judge “will give you some form of this instruction every time we take a break.”³⁴⁶ The Multnomah County instructions even address the conscientious juror who thinks that by knowing more she will be able to better fulfill her duties.³⁴⁷ The Multnomah County instructions make it clear to this type of juror that “it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should.”³⁴⁸

Finally, the Multnomah County instructions inform the juror that she might be held in contempt of court for violating the instructions. Although penalties should be a last resort to correct inappropriate behavior, they sometimes are necessary.³⁴⁹ Thus, courts should warn jurors that they may be penalized for misconduct. One Jury Survey respondent noted, “When a juror can sit in the privacy of their [sic] own home and find out info about the case they [sic] really need strong discouragement.”³⁵⁰

The one superior aspect of the Judicial Conference Committee instructions is that they directly address the issue of jurors researching “individuals,” not just the facts or

344. *Multnomah County Jury Instructions*, *supra* note 336.

345. See Hannaford-Agor, *supra* note 60, at 45. According to Lake County Common Pleas Court Judge Vincent Culotta: “The definition of talk has changed. Talk now includes blogging, [posting] on [your] Facebook account, text messaging, e-mailing.” Lammers, *supra* note 307 (second alteration in original) (quoting Judge Culotta).

346. *Multnomah County Jury Instructions*, *supra* note 336.

347. According to one Jury Survey respondent, “Jurors want to do the right thing—that is a double-edged sword. They think the more info they have the better job they will do.” Jury Survey, *supra* note 36.

348. *Multnomah County Jury Instructions*, *supra* note 336.

349. See Pamela MacLean, *Jurors Gone Wild*, CAL. LAW. (Apr. 2011), <http://www.callawyer.com/story.cfm?eid=914907&evid=1>.

350. Jury Survey, *supra* note 36.

circumstances surrounding the case. For example, these instructions tell jurors not to “conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case.”³⁵¹ As illustrated in *Russo v. Takata*, jurors like to know the backgrounds of the parties in a particular case.³⁵² Thus, jury instructions should address this issue.

With respect to the negative features of both instructions, they lack the self-policing section advocated by some legal commentators.³⁵³ This additional safeguard is important in light of the secrecy and deference normally given to jury deliberations.³⁵⁴ Without this requirement, it is difficult to ensure that the instructions will be followed and that juror misconduct, if it occurs, will be discovered.³⁵⁵ Also, neither instruction specifically informs jurors that disobeying court rules violates the juror’s oath. This latter point was significant for at least one Jury Survey respondent.³⁵⁶

351. JUDICIAL CONFERENCE COMM. INSTRUCTIONS, *supra* note 337.

352. See *supra* notes 103–10 and accompanying text.

353. Judge Dennis M. Sweeney (Retired), *Worlds Collide: The Digital Native Enters the Jury Box*, 1 REYNOLDS CTS. & MEDIA L.J. 121, 141 (2011) (“If you become aware that any other juror has violated this instruction, please also let me know by a note.”); see also Brickman et al., *supra* note 2 at 298. Several states also impose a duty on jurors to report misconduct by fellow jurors. A Tennessee jury instruction reads as follows: “Any juror who receives any information about this case other than that presented at trial must notify the court immediately.” Robinson, *supra* note 203, at 389 (2011) (quoting TENN. JUDICIAL CONFERENCE, COMM. ON PATTERN JURY INSTRUCTIONS (CIVIL), TENN. PATTERN JURY INSTRUCTIONS (2010)). “[T]he only way to ensure that deliberations are not tainted by information that shouldn’t be brought into the jury room is to ‘get jurors to police themselves.’” Porter, *supra* note 100, at 14 (quoting trial consultant Amy Singer).

354. See Zemlicka, *supra* note 221 (“Under [Judge] DiMotto’s instructions, a fellow juror would be responsible for reporting misconduct to the court.”). See generally Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493 (2001).

355. Hirsch, *supra* note 21 (“Unless a juror informs the court that another juror has conducted internet research, or . . . the material is discovered, [juror research] is impossible to police.”) (quoting barrister Eleanor Laws); see, e.g., *Altman v. Bobcat Co.*, 349 F. App’x 758, 760–61 (3d Cir. 2009).

356. Jury Survey, *supra* note 36.

3. Model Instructions

a. Introduction to Model Instructions

The model instructions created in this Article are an amalgamation of jury instructions from across the country.³⁵⁷ They were created because no single jurisdiction had instructions that addressed all of the concerns raised by this Article. Hopefully, these instructions will serve as a model for jurisdictions that have yet to update their instructions or who feel that their updates were insufficient. In addition, these model instructions can be useful to practitioners who are concerned with jurors conducting improper research and communications.³⁵⁸ The instructions assume that the jurisdiction does not allow pre-deliberation discussions between jurors. If that is not the case, then these instructions would have to be slightly modified by removing or altering the section on pre-deliberation discussions.

b. Text of Model Instructions

Introduction: Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

Communications: During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your

357. These instructions also benefitted from the useful suggestions of Eric P. Robinson, Deputy Director of the Donald W. Reynolds Center for Courts and the Media at the University of Nevada at Reno.

358. The defense team representing Barry Bonds in his 2011 perjury trial used a modified version of these instructions. Howard Mintz, *Jurors Must Lay Off Twitter, Facebook, iPhones and All Else for Barry Bonds Trial*, OAKLAND TRIB., Mar. 5, 2011.

experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. “No discussion” extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, iTouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

After you retire to deliberate, you may begin to discuss the case with your fellow jurors and only your fellow jurors.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don’t think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial. The second reason is that, by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case before deliberations you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party. If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to me or my staff.

Research: Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the

Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and we may “Google” things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the judge to the jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

Ramifications: If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty

to report it to me or my staff so that we can protect the integrity of this trial.

CONCLUSION

The Digital Age, with its advancements in technology, has made it easier for jurors to violate courts' prohibitions against juror research and communications. This Article has suggested four possible solutions to combating this problem. The first two, increased penalties and greater monitoring of juror activity, take a somewhat paternalistic approach to the issue by treating jurors like children who need to be watched and punished when they fail to follow the rules. This course of action, while possibly beneficial in the short-term, may prove ineffective or harmful in the long-term. This is because these solutions only address the symptoms of juror misconduct, not its cause. Thus, courts will always be chasing the next technological advancement that facilitates juror research or communications. Second, and more importantly, these two proposals will discourage citizens from participating in jury service.

In the alternative, the courts could take a more holistic view of the problem. Thus, rather than solely blame the jurors, courts could examine the trial process as a whole and attempt to eliminate the reasons for juror misconduct. This would require the courts to reconsider the type of information made available to jurors. As discussed earlier, many instances of juror misconduct can be traced to a juror's desire for more information. Allowing juror questions will help curb this desire. This solution provides jurors with additional information while not violating the Rules of Evidence or the Constitution. It also allows courts to maintain control of what information jurors see and hear.

Besides permitting questions, courts also need to improve jury instructions. Today's instructions need to inform jurors that routine practices such as "Googling" individuals or discussing their own lives on social media websites, which they have grown accustomed to and reliant on, is incompatible with jury service. In providing these instructions, courts need to ensure that jurors know why such activity is prohibited. While some jurisdictions have updated their jury instructions to reflect the changes brought by the Digital Age, others have not.

In order to facilitate and encourage jurisdictions to re-examine and improve their instructions to jurors, this Article has created model instructions that will hopefully serve as a template for others to use.

The jury, throughout its approximately 400-year history in America, has witnessed many changes and upheavals in the legal system. Through each one, the jury has adapted and survived. Thus, it is highly likely that the jury will weather the storm of the Digital Age. The question becomes: How will it evolve? This author hopes that any changes to the jury go towards empowerment, allowing jurors to function as equal partners in the courtroom.

APPENDIX (JURY SURVEY QUESTIONS)

1. Do you believe that jurors who access the Internet during trial to find out information about the pending case is a problem? If it is not a problem, please state why you feel this way.

2. Do you or the court in which you sit³⁵⁹ have a policy or rule on jurors accessing the Internet while on jury duty? If you answer “No,” go to question #6.

3. Can you briefly describe this policy or rule?

4. How long has the rule or policy been in place?

5. Do you think the policy or rule is effective? If not, what changes should be made?

6. To date, have you had instances of jurors improperly accessing the Internet while on jury duty? If “Yes,” what action if any did you take as a result of the juror(s) accessing the Internet?

7. Of the following suggestions which one do you think is most effective at preventing jurors from accessing the Internet? Please state why you believe this one is most effective.

(a) Instruct jurors in the initial summons that they must refrain from accessing any information about the trial from the Internet.

(b) Use voir dire questions that actually address Internet use by jurors.

359. The Jury Survey sent to federal prosecutors and defenders was very similar to the one in the Appendix. Slight changes were made in the language (for example, “which you sit” was changed to “where you practice”).

(c) Revise jury instructions with specific language about using the Internet during trial. Repeat these instructions throughout the trial.

(d) Have jurors sign declarations stating that they will not use the Internet to research the trial.

(e) Educate jurors about the importance of jurors deciding cases on the facts presented.

(f) Make it clear that using the Internet to access information about the trial is a violation of the court's instructions.

(g) Allow questions by jurors.

(h) Prohibit jurors from accessing items like cell phones, laptops etc.

(i) Other (please describe).

8. Do you have any additional views about jurors and the Internet not covered by this survey that you would like to discuss?

9. Do you think it is appropriate for opposing parties to conduct Internet research on jurors? If yes, do you believe that such research should be turned over as part of the Discovery process?

10. Do you think it is appropriate for jurors to communicate with one another online or otherwise prior to deliberations?